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No. 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LOCAL LODGE NO. 1424, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND BRYAN MANUFACTURING COMPANY, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, Judge Fahy dissenting, is reported at 264 F.2d 575 (R. 466-477). The decision and order of the Board, Chairman Leedom and Member Murdock dissenting, are reported at 119 NLRB 502 (R. 428-461, 325-427).

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1959 (R. 478). The petition for a

writ of certiorari was granted on June 22, 1959 (R. 479). 360 U.S. 916. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the six-month period of limitations of Section 10(b) of the National Labor Relations Act bars the issuance of a complaint to invalidate a collective bargaining agreement and a successor collective bargaining agreement, both lawful on their face and containing a conventional union shop provision, where the sole foundation for the complaint is an alleged unfair labor practice which occurred at the time of the execution of the original agreement more than six months before the filing and service of the charge.

2. Whether, based exclusively on a finding that the original union shop agreement was executed at a time when the contracting union did not have a majority, the National Labor Relations Board may require the employer and the union to reimburse the employees for the union dues and initiation fees remitted by the employer to the union pursuant to the individual check-off authorization of each employee, the period of the refund to run for the term of the original and all succeeding union shop agreements beginning six months preceding the filing of the charge.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et. seq.*), are set forth in Appendix B, *infra*, pp. 105-110.

STATEMENT

I. The Subsidiary Findings of Fact

Among the plants operated by the Bryan Manufacturing Company in 1954 was one at Reading, Michigan (R. 337). Under date of July 17, 1954, a representative of the International Association of Machinists, E. L. Schwartzmiller, wrote to the plant manager of the Company's Reading plant that (R. 356-357):

> Please be advised that the International Association of Machinists represent a majority of the "production and maintenance" employees of your company.
>
> This is to request a meeting at your earliest convenience to discuss the terms of a collective bargaining agreement. I will be available for such meeting anytime the week of July 26, 1954. Please advise me of the time, date and place you wish to meet.

Upon receiving this letter, Leslie J. Westbrook, then plant manager of the Reading plant, consulted his attorney, Walter E. Probst (R. 357). In a telephone conversation, Probst stated that he "would advise recognizing them because he had been doing business with them in other plants"; he said that he had found in his dealings with the IAM that whenever a company had "contested," the IAM had "won out"; he observed that he had found the IAM "fair to work with," that they "could get along," and that they "might as well go ahead and have the meeting with them"; and he concluded that if they did not "go ahead and arrange for a meeting," they would "get beaten in the end" (R. 357-358).

About a week after this telephone conversation, Probst, Westbrook, and R. W. Adams, vice-president

of the Company, met (R. 358). They decided to recognize the IAM *(ibid.)*. Tentative contract provisions were discussed among themselves *(ibid.)*. A meeting with IAM representative Schwartzmiller was arranged for August 10 *(ibid.)*.

On August 10, Westbrook, accompanied by Probst and Gallucci (another Company attorney), met with Schwartzmiller (R. 358). The meeting was devoted to negotiating an agreement *(ibid.)*. By the end of the meeting, except for wages and seniority, accord had been reached on the basic terms of a two-year collective bargaining agreement covering the Company's employees at the Reading plant *(ibid.)*. As expressed by Westbrook, "We had our proposal, Mr. Schwartzmiller had his. We argued back and forth, cutting out, putting in, until we arrived at an original contract . . . to be presented to the employees" (R. 358-359).

The Company in the agreement extended exclusive recognition to the IAM as the bargaining representative of the employees at the Reading plant (R. 350, 283-284):

> The Company recognizes the Union as the sole and exclusive bargaining agency for all employees within the bargaining unit consisting of the following: all present and future employees of the company, excepting foremen, working foremen, office or clerical employees, professional employees, guards and all supervisors as defined in the Act.

Among the terms of the agreement was a conventional union shop provision (R. 351):

> As a condition of employment, all employees covered by this agreement shall, forty-five (45)

> days after the date of execution of this agreement, or in the case of new employees forty-five (45) days after the date of hiring, become members of the Union, and remain members in good standing in the Union during the term of this agreement.

The agreement also provided for the check-off of union dues and initiation fees upon the individual authorization of each employee (R. 284):

> Upon receipt of a signed authorization of the employee involved, the Company shall deduct from the employee's pay check the initiation fee and dues payable by him to the Union during the period provided for in said authorization.

The agreement covered the conventional subjects of a collective bargain including provisions pertaining to management functions, hours and overtime, paid holidays, reporting and call-in time, and a grievance and arbitration procedure (R. 350 and n. 14, 283-297). The agreement provided for a two-year term from August 10, 1954 to August 10, 1956, with a provision for automatic renewal from year to year in the absence of timely notice to terminate, amend, or modify (R. 352). This basic agreement was signed for the Company by vice-president Adams about August 12 or 13 (R. 352), and for the IAM by Schwartzmiller not later than August 17 (R. 389).

By August 17 an agreement on wages was also reached, signed, and incorporated into the basic agreement (R. 352-353, 299-301). The wage rates were made effective as of August 10, and involved a five cents per hour wage increase for all employees, with a further five cents per hour increase in December 1954 *(ibid.)*.

The wage rates were to remain in effect until August 10, 1955, when "hourly wage rates only" could be reopened upon sixty-days prior written notice *(ibid.)*. Finally, on September 2, 1954, accord was reached upon principles and procedures pertaining to seniority and these were incorporated into the basic agreement (R. 353-354, 297-299).

About a year later, on August 30, 1955, a second agreement, for a three-year term from August 10, 1955 to August 10, 1958, was entered into between the Company and Local Lodge No. 1424 (R. 392, 302-323), the Local Lodge having been founded prior to January 1955 (R. 369, n. 45). The unit of employees covered by this agreement included, in addition to the production and maintenance employees at the Reading plant, the production and maintenance employees at a second plant at Hillsdale, Michigan, some twelve miles away (R. 338, 343, 393-394). The acquisition of the second plant at Hillsdale was necessitated by the Company's outgrowth of available facilities at the Reading plant (R. 393-394). Thus, at the time the second agreement was reached on August 30, 1955, the Reading plant, which it had originally been planned would operate with about 150 to 200 employees, had expanded to 350 employees *(ibid.)*. It was planned that the Hillsdale plant, which went into operation two months after the second agreement was signed, would be manned, as it was, by the transfer of employees from the Reading plant *(ibid.)*. As the Board found, "the unit included in neither [the 1954 or 1955] agreement is challenged. In short, there is no contention that the expansion of the unit in the 1954 agreement to include the same employee classifications at the recently opened Hillsdale plant, along with those

same classifications at the Reading plant, makes the thus expanded unit in the 1955 agreement in any way inappropriate". (R. 344).

The 1955 agreement drastically revised the provisions pertaining to seniority, particularly providing for the retention of seniority in both the Reading and the Hillsdale plants by all employees on the payroll as of August 30, 1955 (R. 393). Settling the question of the seniority of the Reading employees to be transferred to the Hillsdale plant, in advance of operations at the latter plant, was obviously advantageous to all (R. 394). In addition, the wage and job classification structure was fundamentally altered. In contrast with the seven job classifications set out in the 1954 wage supplement, the wage supplement of the 1955 agreement contains eleven classifications, each with three sets of wage rates to be effective on August 10 of 1955, 1956, and 1957, respectively (R. 393). Thus, a tool and die operator, who before August 10, 1955, was rated at $2.05 per hour, received a fifteen cents increase as of August 10, 1955, a further eight cents increase as of August 10, 1956, and an additional eight cents increase as of August 10, 1957 (Compare R. 300 with 323). Numerous additional changes were made of the type which a year's experience might well have indicated were desirable (R. 392-393). The union shop and check-off provisions of the two agreements remained the same (R. 392).

On August 10, 1954, the effective date of the first agreement, there were 148 employees within the unit (R. 382, 365, n. 36). On August 30, 1955, the date the second agreement was made, there were about 350 employees in the unit (R. 394). On November 21, 1955, almost three months later, there were about 480

employees within the unit (R. 394, n. 69). Of the 480 employees in the unit on November 21, 1955, except for 30 to 40 "probationary" employees (those employed 60 days or less), all had authorized the Company to check-off their dues (R. 394, n. 69). Similarly, the 350 employees in the unit on August 30, 1955, had authorized dues check-offs (R. 394). No employee who had been with the Company 45 days or more had ever refused to have his dues checked off (R. 394, n. 69).

The unfair labor practice charges in this case were filed and served more than six months after the Company had recognized and contracted with the IAM on August 10, 1954. On June 9, 1955, Maryalice Mead, an individual, filed a charge against the Company (R. 263-264), served the next day (R. 327, n. 2), and on August 5, 1955, she filed a supplemental charge against the Company (R. 265-266), served on August 8, 1955 (R. 327, n. 2). The June 9 charge was filed and served ten months after the Company had recognized and contracted with the IAM on August 10, 1954. The same individual filed a charge against the IAM and Local Lodge No. 1424 on August 5, 1955 (R. 260-262), which was served on August 8, 1955 (R. 327, n. 2). The August 5 charge was filed and served almost twelve months after the Company had recognized and contracted with the IAM on August 10, 1954.

The charge against the unions, as the supplemental charge against the Company, alleged *inter alia* that "at the time of the execution of this collective bargaining agreement" on August 10, 1954, the unions "were not unassisted and/or majority representatives of the employees in the unit . . ." (R. 261, 266). Based

on these charges, separate complaints were issued against the Company and the unions (R. 267-277). As amended, the complaints alleged *inter alia* that at the time of the entry into the first agreement on August 10, 1954, and into the second agreement on August 30, 1955, the "Union did not in fact represent a majority of the employees within the bargaining unit . . ." (R. 268-269, 274, 282-283).

II. The Ultimate Findings As To The Merits Of The Unfair Labor Practices Alleged

On the merits, the Board found that the critical question pertains "to the IAM's lack of majority with respect to the 1954 agreement" (R. 381). It observed that "the crucial date with respect to majority is August 10, 1954, because on that date the Respondent Company, having recognized the IAM and bargained with it, agreed to the provisions of the basic contract which gave the IAM its union-security and check-off benefits" (R. 382). It concluded that, of the 148 employees in the unit, "the IAM had not been designated by a majority of the employees in the appropriate unit at the Reading plant at any time prior to August 16, 1954" (R. 389).

The Board observed that "the ultimate findings as to the 1955 agreement hinge upon findings as to majority and assistance with respect to the 1954 agreement" (R. 387, n. 63). For, in its view, "such adherence as the IAM secured, on and after that date [August 16, 1954], cannot contribute to establishing a valid and unassisted majority" (R. 389). Based on the finding that the Company had assisted the IAM by recognizing and contracting with it on August 10, 1954, when it did not have a majority (R. 389-390,

413 and n. 98), the Board concluded "that the 1955 agreement is subject to the same taint and infirmity as the 1954 agreement" (R. 395).

Accordingly, based on its foundation "finding that at the time the . . . [Company and the IAM] executed the August 1954 agreement the . . . Unions did not represent a majority of the employees covered by the agreement," the Board stated (R. 437):

> It follows therefore, and we find, . . . that . . . the Company violated Section 8(a)(1), (2), and (3) and the . . . Unions 8(b)(1)(A) and (2) by maintaining in effect the 1954 agreement and by executing and maintaining in effect the 1955 agreement, both of which contained unlawful union security clauses.

The union security clauses were found to be unlawful, not because "illegal *per se*" (R. 351), but solely because of the IAM's lack of majority when the 1954 agreement was executed (R. 412-413).

The Board dismissed the allegations of the complaint against the Company that it had "sponsored and dominated the . . . Unions" (R. 413-414).

III. The Disposition Of The Question Whether The Six-Month Period Of Limitations Contained In Section 10(b) Of The Act Barred The Issuance Of The Complaints

Since the critical event—the Company's act of recognizing and contracting with the IAM on August 10, 1954, at a time when the IAM did not have a majority—occurred more than six months before the filing and service of the unfair labor practice charges, the question whether issuance of the complaints was barred by the limitations provision of Section 10(b) of the Act was sharply raised. Section 10(b) provides that:

> . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

A divided Board concluded, by a three to two vote, that issuance of the complaints was not barred by the running of the six-month period of limitations.

In the majority's view, Section 10(b) merely precluded the Board from finding the execution of the 1954 agreement to be an unfair labor practice; it did not bar the Board from finding the maintenance in effect of the 1954 agreement for the period beginning six months preceding the filing of the charge, and the execution and maintenance in effect of the 1955 agreement, to be an unfair labor practice (R. 430-435).

The majority supported its conclusion in reliance upon two concepts: (1) "Section 10(b) is a statute of limitations and not . . . a rule of evidence" (R. 432-433); Section 10(b), therefore, "does not bar the receipt of evidence, antedating the critical period, which may be relevant in determining whether conduct within the 6 months period was unlawful" (R. 433); accordingly, "The legality of the Respondents' conduct in maintaining the 1954 and 1955 union security contracts, and in signing the 1955 agreement, must be considered in the light of the evidence surrounding the execution of the 1954 agreement" (R. 435); so considered, it establishes that it was an unfair labor practice to maintain the 1954 and the 1955 agreements, and to execute the 1955 agreement, because the Company recognized and contracted with the IAM on August 10, 1954 when it did not have a ma-

jority (R. 436-437). (2) Section 10(b) does not bar issuance of a complaint based on maintenance in effect of an agreement *invalid on its face* but executed more than six months before the filing of the charge; there is "no difference in illegality between a contract unlawful on its face, that is, one prescribing a form of union security prohibited by the Statute, and a contract invalid because certain requisites to the making of a valid contract have not been complied with. In both instances the invalidity begins at a point in time and continues so long as the unlawful contract remains in effect"; accordingly, it does not matter that the illegality of an agreement *valid* on its face can be established solely in reliance on an unfair labor practice attending its execution which antedated the charge by more than six months (R. 434-435).[1]

Chairman Leedom and Member Murdock dissented (R. 449-457). The dissenters were of the view—and the majority agreed as to this—that maintenance in effect of the 1954 agreement, and execution and maintenance in effect of the 1955 agreement, could be found to be unfair labor practices only upon the basis of the IAM's recognition on August 10, 1954; that the six-month period of limitations had clearly run as to that alleged unfair labor practice; and that, since the events within the six-month period could be found to be unfair labor practices only on the basis of the barred event, Section 10(b) had eliminated the sole

[1] A concurring opinion, in addition to joining the rationale expressed in the majority opinion, stated a separate basis upon which to support the majority result (R. 443-449). The concurring member noted that his alternative "thinking . . . is . . . fundamentally at variance with that of all my colleagues . . ." (R. 444). Since it did not command the assent of any other member, it will not be considered in this brief.

foundation upon which any determination of an unfair labor practice could be predicated *(ibid.)*.

As to the majority's observation that Section 10(b) does not bar receipt in evidence of events antedating the six-month period, the dissenters pointed out that "evidence as to such events is admissible for background purposes" only, and that it "is well established that in making unfair labor practice findings the Board cannot rely solely on events which occurred more than 6 months before the filing of the charges . . ." (R. 452). As to the majority's assimilation of an agreement invalid on its face with one valid on its face, the dissenters pointed out that the considerations relevant to each are different (R. 451-452):

> . . . in the second type of situation involved herein, where the reason for the invalidity assertedly lies in a failure in executing the agreement to comply with some or all of the requisites for making a valid union-security agreement, the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis. Accordingly, although an agreement invalid in its inception may continue to be invalid throughout its life, the fact of its invalidity and the consequent existence of unfair labor practices cannot be established merely by proof that the agreement was being maintained at some point in time subsequent to its execution, but can only be established by proof of the facts, surrounding its execution in the past, which created the initial invalidity. When as here, therefore, the charges are filed more than 6 months after the execution of the

agreement, proof of its invalidity and the consequent unfair labor practices can only be established by reliance on evidence of events which occurred more than 6 months before the filing of the charge. This Congress expressly precluded by Section 10(b).

A divided Court of Appeals, Judge Fahy dissenting, affirmed the view of the Board majority, stating that mindful of its "limited scope of review" it was "constrained to uphold the Board's conclusion" (R. 469) as "rational" (R. 470) and "not unreasonable" (R. 473). Judge Fahy in dissent stated in part that (R. 477):

> One of the principal purposes of a statute of limitations is to bring repose. As stated in *NLRB* v. *Pennwoven, Inc.*, 194 F.2d 521, 524 (3d Cir. 1952), the rationale underlying such a statute is to prevent "people . . . . being brought to book" upon stale charges." Consistently with this, the period of limitations in the Taft-Hartley Act must have been deliberately adopted by Congress to aid in stabilizing labor relations by precluding adversary proceedings based on events which had laid dormant for six months. Under the decision of the court, however, there is no limit whatsoever to the time that might pass, with countless changes in the details of relations and obligations, without a complaint being barred, although proof of the true basis of illegality of the conduct complained of lies in the years that are gone. This seems to me inconsistent with the Congressional policy expressed in § 10(b).

IV. The Board's Order

The Board's order, enforced by the Court of Appeals (R. 479), *inter alia* requires the Company to cease giving effect to its agreement with the unions, severs

the bargaining relationship between them, and bars a resumption of recognition unless and until the unions have been certified by the Board (R. 437-441). In addition, the order requires that the Company and the unions "shall jointly and severally reimburse the employees and the former employees of the Respondent Company whose initiation fees and/or dues in the Respondent Unions have been checked off pursuant to any agreement between the Respondents for the amounts deducted from the employees' earnings, beginning with the applicable 6-month period" (R. 442).

SUMMARY OF ARGUMENT

I

1. The plain meaning of the six-month period of limitations bars issuance of the complaint. The whole foundation of the complaint rests upon the unfair labor practice of recognizing and contracting with the IAM on August 10, 1954, when it did not have a majority. The complaint is "based upon" that unfair labor practice. It is an unfair labor practice "occurring more than six months" before the filing and service of the charge. And Section 10(b) could not state more plainly than it does that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge. . . ."

2. The purpose of Section 10(b) confirms its plain meaning. Concerned that "people were being brought to book upon stale charges," Congress enacted the "rather brief limitation period . . . to shorten up the time in which respondents could be called to answer charges of unfair labor practice." *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F.2d 521,

524 (C.A. 3). In this case although the critical unfair labor practice was the inception of the relationship between the IAM and the Company on August 10, 1954, no charge was filed until ten months later. Having waited four months too long, the action was forever barred.

If, as here, despite the total dependence of the complaint on the alleged unfair labor practice which occurred on August 10, 1954, the Board may nevertheless proceed on the basis of a charge filed ten months later, why not twenty months, thirty months, or forty months later? And if, as here, the Board can undo the bargaining relationship after the second agreement, simply because of a defect in the original inception of the relationship, why not after the third, fourth, or fifth agreement? To prevent this Congress drew the line at six months. Either that line is to be respected or there is no line.

To disregard the line defeats the purpose of Congress to obviate the evil of delayed litigation "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. Rep. No. 245, 80th Cong., 1st Sess., 40, in 1 Leg. Hist. 331. To disregard the line is also at war with the principle of repose—the stability it is designed to foster if a charge is not timely filed and served within the allowable six month period. If the period of limitations has not run in this case, it never can. A bargaining relationship, defective only because of a misstep in its origin, would be perpetually vulnerable. No limitation would be applicable to it. There "never could be an end to the controversy because in the Board's view the wrong was a continuing tort." L. Hand, J., concurring in

National Labor Relations Board v. *Childs Co.*, 195 F.2d 617, 621 (C.A. 2). "To adopt the Board's theory of the continuing violation is not in accordance with what we believe the intent of the Congress was in establishing the six-months limitation period." *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F.2d 521, 526 (C.A. 3). The "case will never be closed until it is finally litigated" (*id.* at 525); yet to fail to quiet the controversy "would not conduce to that industrial peace which it is the overall purpose of the Act to secure." L. Hand, J., *supra*, at 621-622.

3. When Congress enacted the limitations provision of Section 10(b), the question of applying limitations to union security agreements allegedly unlawful at inception was not *res nova*. On the contrary, beginning July 12, 1943, through the medium of appropriations riders restricting the Board's use of its funds, Congress had safeguarded such agreements from invalidation because of alleged illegality at inception by providing that the Board was not to use its funds to prosecute a complaint "arising over an agreement . . . between management and labor" if no charge had been filed within three months of entry into the agreement and the other conditions of the riders had been met. The six-month limitation of Section 10(b) applicable to all unfair labor practices replaced the three-month limitation of the riders applicable to agreements. As the Senate Report stated, upon adoption of Section 10(b) the limitations riders upon the Board's appropriations "would no longer be necessary. . . ." S. Rep. No. 105, 80th Cong., 1st Sess., 26, in 1 Leg. Hist. 432. To say, therefore, that Section 10(b) does not protect union security agreements allegedly invalid at inception not only renders untrue the statement that the

"riders would no longer be necessary." It also requires the conclusion that, when Congress for the first time in 1947 enacted a statute of limitations having general applicability to all unfair labor practices, it was at the same time and by that very act eliminating the already existing applicability of limitations to union security agreements. This is not possible.

4. To support its conclusion that Section 10(b) does not operate as a bar, the Board sloganizes on two concepts: (a) Section 10(b) is a statute of limitations, not a rule of evidence; (b) continuing violation.

(a) The Board reasons that, as Section 10(b) is a statute of limitations and not a rule of evidence, evidence of events antedating the six-month period is admissible; in this case, consideration of that antedating evidence establishes that the Company originally recognized and contracted with the IAM when it did not have a majority; by reason of this initial invalidity the maintenance of the original agreement and execution and maintenance of the successor agreement within the six-month period may be found to be an unfair labor practice.

To reason in this fashion is to end with the conclusion that Section 10(b) is not only not a rule of evidence, it is not a statute of limitations either. Receipt of evidence antedating the six-month period is therefore subject to the important qualification that such evidence is "admissible only as background for interpretation or clarification" (*Greenville Cotton Oil Co.*, 92 NLRB 1033, 1034, n. 6, affirmed, 197 F.2d 451 (C.A. 5)); it may not be given "independent and controlling weight" (*Universal Oil Products Co.*, 108 NLRB 68, 69-70). The Board disregarded the quali-

fication in this case. The controlling event here is the Company's act of recognizing and contracting with the IAM on August 10, 1954 when the IAM did not have a majority. It is this barred unfair labor practice, which occurred ten months before the first charge was filed, that is the exclusive foundation for the conclusion that offenses occurred within the allowable period. But for this barred act there is *no* evidence of a violation within the six-month period. The unfair labor practice antedating the period is thus used, not as a background evidence, but as the sole evidence upon which to predicate the violation found. The barred event was given more than "independent and controlling weight," it was given exclusive significance. This distortion nullifies the prescriptive purpose of Section 10(b).

(b) The Board reasons that, as Section 10(b) does not bar issuance of a complaint based on continuance in effect of an agreement *invalid on its face* but executed more than six months before the filing of the charge, the same must be true of an agreement valid on its face but illegal because executed when the contracting union did not have a majority. The distinction between the two is obvious and decisive.

With an agreement invalid on its face, no evidence but the agreement is needed to establish the violation of maintaining an unlawful arrangement in effect. No proof of events antedating the allowable six-month period is requisite; no question arises of reliance upon a barred unfair labor practice to establish the violation. In this context the concept of continuing violation is relevant only in refutation of the defense that because the arrangement was inaugurated more than six months before the charge was filed its current main-

tenance in effect is immune. To that argument the simple and direct answer is that the illegality, patent on the face of the agreement and requiring no proof of antecedent events, did not cease with its inception but continued to date.

Not so with an agreement valid on its face. It is not possible to say of such an agreement that on its face its maintenance in effect is a continuing violation. Only proof of illegality in its inception would furnish the predicate for a statement that it is illegal in its continuance. And it is precisely this showing that Section 10(b) operates to preclude when establishment of illegality in inception depends upon proof of an unfair labor practice antedating the filing of the charge by more than six months. That is this case.

II

The Board exceeded its discretionary power insofar as its order requires petitioners to reimburse the employees for the union dues and initiation fees remitted by the Company to petitioners pursuant to the individual checkoff authorizations of each employee.

1. The basic premise of this part of the Board's order is that dues and fees were involuntarily paid under the sanction of the union security agreement, and that since the involuntarism was rooted in an invalid agreement reimbursement is justified. The premise is fundamentally false.

When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement could only be valid "if, following the most recent election held as provided in section 9(e) the Board shall have certified

that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . ." This requirement was repealed on October 21, 1951 (Public Law 189, 82d Cong., 1st Sess.), it having proved "burdensome and unnecessary." *National Labor Relations Board* v. *Gaynor News Co.*, 197 F. 2d 719, 724 (C.A. 2), affirmed, 347 U.S. 17. The union shop authorization polls conducted by the Board overwhelmingly demonstrated that employees voluntarily favor the adoption of union security agreements. They forever put the quietus to the notion that such agreements merely constitute a device to constrain the payment of dues and fees by an unwilling majority. These agreements operate compulsively only as to that small group known as "'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union. . . ." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 41. Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way.

There is no reason to suppose that the sentiment was different in the present case for the period to which the refund order is applicable. While the 1951 amendment repealed the requirement of a *prior* election to validate a union security agreement, it substituted in its stead the stipulation that a union security agreement may neither be executed nor enforced if "following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement" (Section

8(a)(3) proviso). Thus the employees have it within their power to divest an agreement of its union security provision. No deauthorization petition was ever filed in this case, although it could have been at any time (*Andor Co., Inc.*, 119 NLRB 925), the only requirement for the conduct of an election being that the petition be supported "by 30 per centum of the employees in a bargaining unit covered by an agreement" containing a union security clause (Sec. 9(e)(1)). Not even 30 percent of the employees could be mustered to support an election looking toward rescission of the union security provision of the agreements.

This record demonstrates the extremes of the Board's assumption. The Board premises the invalidity of the union security agreement upon the single circumstance that less than half of 148 employees designated the IAM to represent them on August 10, 1954. Yet there were 850 employees in the unit about a year later, more than doubling the initial complement; and there were 480 employees in the unit on November 21, 1955, more than tripling the initial complement (*supra*, pp. 7-8). Thus most of the employees were newly added after the original execution of the 1954 agreement. When they arrived on the scene they found nothing but the conventional manifestations of a typical bargaining relationship. There is no reason to suppose that they did not willingly embrace what was found, as is true in thousands of plants throughout the United States.

2. The emptiness of the Board's major premise is matched by its disregard of other cogent considerations. The 1954 and 1955 agreements provided substantial benefits for the employees. The negotiation of an agreement costs money, as does its administration. Dues and fees go towards defraying the cost. They do

not repose in depositories. It may safely be assumed that much of the fees and dues collected in this case have been expended to pay for services. To require the refund of dues and fees at this late date does not simply mean that the employees will have received the benefits of union representation without contributing to their cost. The moneys for reimbursement must come from somewhere, and insofar as the unions are concerned, they must come from the dues and fees paid by other employees in other plants. What reimbursement comes down to, therefore, is that the employees in this case will have the benefits they secured from union representation paid for by the employees in other plants. Moreover, not only does the Board disregard past services, but to drain a union's treasury disables it from as effectively negotiating and administering future agreements, and prejudices as well its capacity to establish and maintain intraunion benefit programs. And insofar as the Company is concerned, it simply acted as a conduit for the transmission of the funds.

3. It is the fees and dues *checked-off* pursuant to the employee's individual authorization which are to be refunded. If, as we must infer from the Board's order, it is the check-off authorization which is critical, it is plain that that authorization is the individual voluntary act of each employee. Nothing compels the check-off authorization; it serves the employee's convenience as well as the union's. Thus in requiring reimbursement of *checked-off* fees and dues, the Board's order identifies as critical the very act which indisputably flows from the employee's individual authorization.

4. The Board's refund order extends and misapplies this Court's decision in *Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533.

This Court decided that a refund order was within the Board's power and that the exercise of the power was within the Board's discretion in the particular circumstances of that case. But the ruling circumstance in *Virginia Electric*, which controlled the evaluation of every other factor, was the company-dominated character of the contracting union. The ruling factor of domination present in *Virginia Electric* is absent here. In this case the Board expressly found that the unions were *not* sponsored or dominated by the Company (R. 413-414). And there are no substituting circumstances which the Board has convincingly appraised or which exist to support the refund order here. On the contrary, it is demonstrable that the Board's current use of the refund order is deliberately designed to accomplish a punitive purpose, not a remedial objective.

The Board's discretion is not so limitless as to authorize it to mulct an employer and a union by requiring the refund of dues and fees—which the employer never kept and which the union has long since expended to pay for service—upon the basis of nothing but a hostile surmise that the dues would not have been paid but for the union security provision of the agreement.

ARGUMENT

I. THE SIX-MONTH PERIOD OF LIMITATIONS CONTAINED IN SECTION 10(b) OF THE ACT BARS ISSUANCE OF THE COMPLAINTS.

Section 7 of the Act provides that, except as affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3), "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .". The Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of such rights (Section 8(a)(1)); to "contribute . . . support" to a labor organization (Section 8(a)(2)); and "to encourage or discourage membership in any labor organization" by discrimination in employment (Section 8(a)(3)). The prohibition against encouragement of union membership by discrimination in employment is subject to the important qualification expressed in the proviso to Section 8(a)(3) authorizing union security agreements. In presently relevant part the proviso reads that:

> . . . nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . .

As to a labor organization or its agents, it is an unfair labor practice for them "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7" (Section 8(b)(1)(A)), and "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)" (Section 8(b)(2)).

The Board found that the Company violated Section 8(a)(1), (2), and (3) of the Act, and the unions Section 8(b)(1)(A) and (2). As applicable to this case, the crux of the Section 8(a)(1) and (2) violation is

the act of an employer in recognizing and contracting with a union as the exclusive representative when it does not have majority status. *Infra*, pp. 63-65. And the crux of the Section 8(a)(3), 8(b)(1)(A), and 8(b)(2) violation is inclusion in an agreement of a union security provision conditioning employment on union membership, in the absence of the contracting union's designation as the majority representative by the employees "covered by such agreement when made" as required by the proviso to Section 8(a)(3). *Infra*, pp. 63-65.

The violations found rest exclusively upon a single central unfair labor practice finding. That finding is that on August 1, 1954, at a time when the IAM did not represent a majority of employees within the appropriate unit, the Company extended exclusive recognition to and contracted with the IAM (*supra*, p. 10). But for this unfair labor practice no violation of any kind could be found. Since this unfair labor practice occurred more than six months before the filing and service of the earliest charge, the focal question is whether a complaint founded upon it is barred by the six-month period of limitations contained in Section 10(b) of the Act.

A. To Base A Complaint Upon An Unfair Labor Practice Antedating The Six-Month Period of Limitations Is Barred By The Plain Meaning Of Section 10(b).

Section 10(b) of the Act provides in relevant part that:

> . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

The whole foundation of the complaint rests upon the unfair labor practice of recognizing and contracting with the IAM on August 10, 1954, when it did not have a majority. The complaint is "based upon" that unfair labor practice. It is an unfair labor practice "occurring more than six months" before the filing and service of the charge. And Section 10(b) could not state more plainly than it does that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge. . . ."

The total dependence of the complaint upon the barred unfair labor practice is sharply shown by the fact that the events within the allowable six-month period preceding the earliest charge are barren of any suggestion of an unfair labor practice. The findings disclose the sole happenings within the period to be: (1) the existence and administration of a conventional collective bargaining agreement containing an orthodox union security provision; and (2) the negotiation, execution, and administration of a successor agreement, providing for substantial wage increases, adjusting numerous provisions of the predecessor agreement in the light of a year's experience under it, and settling the seniority problems raised by the anticipated operation of a second plant, the second agreement also containing an orthodox union security provision *(supra*, pp. 6-7).

Nothing in these typical manifestations of a labor-management collective bargaining relationship remotely resembles an unfair labor practice. "Certainly mere recognition and bargaining are not illegal in themselves." *Armco Drainage & Metal Products, Inc.*, 106 NLRB 725, 730, enforced as modified, 220 F. 2d 573 (CA. 6), cert. denied, 350 U.S. 838. Furthermore,

"If any presumption is to be indulged in where a formal collective bargaining agreement has been entered into, it is the ordinary presumption of legality. Nothing in the act and no authority or rule of law is called to our attention which requires us to presume that all union or closed shop provisions are prima facie illegal. . . ." *Levinsolin Corp.* v. *Joint Board*, 229 N.Y. 454, 87 N.E. 2d 510, 514.[2] As the Board has repeatedly held in construing collective bargaining agreements, an argument is untenable which "presumes illegality", for "the proper presumption is one of legality." *Humboldt Lumber Handlers Inc.*, 108 NLRB 393, 395; *New Orleans Laundry, Inc.*, 100 NLRB 966, 968.[3]

It is crystal clear, accordingly, that the events within the allowable six-month period are wholly benign; indeed, they are clothed with the strong presumption favoring the validity of an established relationship. Only by importing into these events the barred unfair labor practice of August 10, 1954 —upon which limitations had already run by four months—can sinister significance be given to them. But Section 10(b) "extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge." *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301, 309, n. 9. Nothing in Section 10(b) permits revival of that extinct liability. On the contrary Section 10(b) prohibits issuance of a complaint "based upon" it. The complaint in this case is based upon nothing but it.

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[2] Of course, by virtue of the absolute outlawry of the closed shop by the 1947 amendments to the proviso to Section 8(a)(3) of the Act, the statement is subject to qualification if its reference to closed shop provisions is meant in a technically precise sense.

[3] The vigor of the policy underlying the presumption of validity of an existing agreement is strikingly illustrated in the Board's conduct of representation proceedings. When a representation

B. The Purpose Of The Six-Month Period Of Limitations Confirms Its Plain Meaning.

The purpose of Section 10(b) confirms its plain meaning. The six-month limitations period was newly adopted in 1947. Concerned that "people were being brought to book upon stale charges," Congress enacted the "rather brief limitation period . . . to shorten up the time in which respondents could be called to answer charges of unfair labor practice." *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F. 2d 521, 524 (C.A. 3).[4] Enactment of limitations had been severely

petition is filed, looking towards a redetermination of the bargaining representative, the Board will ordinarily not entertain that petition if filed more than 150 days and less than 60 days before the end of so much the fixed term of an existing collective bargaining agreement which does not exceed two years. *Pacific Coast Ass'n.*, 121 NLRB No. 134, 42 LRRM 1477; *cf., National Labor Relations Board* v. *Geraldine Novelty Co.*, 173 F.2d 14, 16-17 (C.A. 2). In giving effect to the agreement as a bar, the Board refuses to inquire into the question whether the contracting union represented a majority of the employees when the agreement was executed. "With respect to the allegation that the Intervenor did not, on the date the contract was executed, represent a majority of the employees in the unit, it is the practice of the Board in representation cases, at least so far as the question of a bar to a proceeding is concerned, to presume the legality of a collective agreement and to refuse to admit evidence on the question whether at the time the contract was executed a majority of the employees covered by such contract had designated the contracting union as their bargaining representative. The regularity and legality of the 1949 contract, insofar as the majority representation question is concerned, must be presumed for the purpose of this proceeding." *Ixing Feller*, 90 NLRB No. 133, 26 LRRM 1284 (unreported); *Electro Metallurgical Co.*, 72 NLRB 1396, 1399.

[4] The House bill, as reported and passed, in addition to providing for a six-month limitation for the filing and service of a charge after the event, also provided a further six-month limitation upon the issuance of the complaint after the charge was filed.

criticized and sharply opposed, fear having been expressed that it would permit unfair labor practices to go unredressed, particularly in that six months was "the shortest statute of limitations known to the law . . ."[5] But the view prevailed that "There must be a limitation as to time," and that "within 6 months the complainant against an unfair labor practice should be able to bring it to the attention of the National Labor Relations Board."[6]

Whether the redress of unfair labor practices should be barred by limitations, and the shortness of the period within which the bar should operate, are questions exclusively within the competence of Congress. Congress exercised its judgment by enacting a six-month statute of limitations. In this case the critical unfair labor practice was the inception of the relationship between the IAM and the Company on August 10, 1954. But

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H.R. 3020, 80th Cong., 1st Sess., April 11 and 18, 1947, Sec. 10(b), in 1 Leg. Hist. 66-67, 193-194. The Senate bill, as reported and passed, contained only the first limitation. S. 1126, 80th Cong., 1st Sess., April 17, 1947, Sec. 10(b), in 1 Leg. Hist. 124; H.R. 3020, 80th Cong., 1st Sess., May 13, 1947, in 1 Leg. Hist. 252. The conference agreed to accept the Senate version, omitting the time limitation upon issuance of the complaint after the charge was filed, the thought being that delay in the issuance of the complaint would be obviated by "the increased membership of the Board and other changes in the administrative provisions of the act. . . ." H.Conf. Rep. No. 510, 80th Cong., 1st Sess., 53, in 1 Leg. Hist. 557; *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F.2d 521, 525, n. 2 (C.A. 3).

[5] S. Min. Rep. No. 105, 80th Cong., 1st Sess., 5, 37; H. Min. Rep. No. 245, 80th Cong., 1st Sess., 90; 93 Cong. Rec. 3823, 4030, respectively in 1 Leg. Hist. 467, 499, 381, 2 Leg. Hist. 998, 1035.

[6] 93 Cong. Rec. 4283 in 2 Leg. Hist. 1149; see also, H.Rep. No. 245, 80th Cong., 1st Sess., 40; S.Rep. No. 105, 80th Cong., 1st Sess., 26; H.Conf. Rep. No. 510, 80th Cong., 1st Sess., 53; respectively in 1 Leg. Hist. 331, 432, 557.

no charge was filed until ten months later. It could have been filed as easily within the prescribed six months of the event. Having waited four months too long, the action was forever barred. This is what it means to have a statute of limitations. Whatever harm ensues from an unredressed unfair labor practice is no different from the "loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary." *Kavanaugh* v. *Noble*, 332 U.S. 535, 539. And it is just as likely that the statute will bar a baseless claim as a meritorious one.

If, as here, despite the total dependence of the complaint on the alleged unfair labor practice which occured on August 10, 1954, the Board may nevertheless proceed on the basis of a charge filed ten months later, why not twenty months, thirty months, or forty months later? And if, as here, the Board can undo the bargaining relationship after the second agreement, simply because of a defect in the original inception of the relationship, why not after the third, fourth, or fifth agreement? To prevent this Congress drew the line at six months. Either that line is to be respected or there is no line.

Adherence to the line is essential to realizing the purpose of Congress in enacting Section 10(b). It sought to obviate the evil of delayed litigation "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. Rep. No. 245, 80th Cong., 1st Sess., 40, in 1 Leg. Hist. 331. In this case this mischief was already manifest. As the trial examiner observed (R. 346-347):

> It is evident that with many witnesses testifying as to numerous different matters, it would protract this Report greatly to summarize all of the testimony, or to spell out fully the confusion and inconsistencies therein, *much of which is not too surprising, in view of the fact that, with respect to the events of August 1954, there had been a lapse of almost 15 months before testimony was given in November 1955.* [Emphasis supplied.]

The mischievous consequence of disregarding the line is graphically revealed in *Lively Photos, Inc.*, 123 NLRB No. 126, 44 LRRM 1064. In that case, the employer and the union, on May 17, 1954, entered into a collective bargaining agreement containing a union shop provision valid on its face. This agreement was continued in effect for about two years and two and one-half months. Then, on August 1, 1956, a second union shop agreement was entered into, with an expiration date of May 15, 1957, and with a provision for automatic renewal thereafter. This agreement was still in effect on November 3 to 5, 1958, the dates of the hearing. Meanwhile, on December 5, 1957, three years and eight months after the first agreement was entered into, the unfair labor practice charges were served, and a complaint thereafter issued. In adjudicating the complaint, the Board stated that "the crucial question . . . is whether on May 17, 1954, when the Company signed its contract with the Union, the latter had been previously designated as the bargaining representative by a majority of the Company's employees in an appropriate unit" (sl. op., p. 2, intermediate report). The Board found that on that date the union did not have a majority. And on the authority of the instant decision it rejected the defense of limitations. Accord-

ingly, on May 11, 1959, almost five years after the original inception of the bargaining relationship, the Board entered an order *inter alia* invalidating the agreements and severing the bargaining relationship. Chairman Leedom expressed the vice in the Board's position (44 LRRM 1064, 1065):

> Chairman Leedom joins in the decision in this proceeding because he deems himself bound by the Board's decision in *Bryan Manufacturing Company, supra* [119 NLRB 502, enforced 264 F. 2d 575 (C.A.D.C.), certiorari granted, 360 U.S. 916]. He notes, however, that the decision herein, which contrary to the express statutory mandate requires that the parties litigate events which occurred many years before the filing and service of the charges, graphically illustrates the defect of the majority position in the *Bryan* case. The events in issue herein occurred in May, 1954; the charges were not filed until December, 1957; and the only certainty at the hearing in November, 1958, was that none of the witnesses could clearly recall the details of the events which had occurred some 4½ years before.

To disregard the six-month line not only disserves the pragmatic purpose of protecting a respondent against the bringing of a charge after "evidence has been lost, memories have faded, and witnesses have disappeared."[7] It also offends the more fundamental policy which underlies every statute of limitations. A person against whom a wrong is alleged ought not to be forever under the anxiety of potential litigation and disruption of the *status quo*; a person who cherishes a right ought to be diligent to enforce it. "Prescription

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[7] *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 349.

and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defect of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organum gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed. In cases like the present, when the period of limitations is short, no doubt other but also important elements are predominant—the desirableness for business reasons of getting a quasi public transaction finished—but whatever the details, the principle involved is as worthy of respect as any known to the law." Mr. Justice Holmes in *Dunbar* v. *Providence and Boston R.R. Co.*, 181 Mass. 383, 385.[8]

The principle of repose has special appeal in labor relations. Maintenance of the stability of an established bargaining relationship is as important a value as any in the industrial world. In this case, whatever defect there may have been in its inception, the findings establish that the relationship between the Company and the unions is viable and going, productive of many benefits for the employees and responsive to the needs of the plant community. Yet, despite two agree-

[8] See also, Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 477, also in Collected Legal Papers, 199-200 (1920): "[T]he foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. . . . A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man."

ments and the creation of an industrial way of life, the Board's order would uproot this relationship wholly.

The result is at war with the principle of repose—the stability it is designed to foster if a charge is not timely filed and served within the allowable six-month period. If the period of limitations has not run in this case, it never can. A bargaining relationship, defective only because of a misstep in its origin, would be perpetually vulnerable. No limitation would be applicable to it. There "never could be an end to the controversy because in the Board's view the wrong was a continuing tort." L. Hand, J., concurring in *National Labor Relations Board* v. *Childs Co.*, 195 F. 2d 617, 621 (C.A. 2). "To adopt the Board's theory of the continuing violation is not in accordance with what we believe the intent of the Congress was in establishing the six-months limitation period." *National Labor Relations Board* v. *Pennwaxen, Inc.*, 194 F. 2d 521, 526 (C.A. 3). The "case will never be closed until it is finally litigated" (*id.* at 525); yet to fail to quiet the controversy "would not conduce to that industrial peace which it is the overall purpose of the Act to secure." L. Hand, J., *supra*, at 621-622.

C. The Legislative History Shows That A Prime Object Of The Statute Of Limitations Was To Safeguard A Union Security Agreement From Invalidation If Entry Into It Was Not The Subject Of A Timely Charge Filed Within The Requisite Period Which Began To Run From The Inception Of The Agreement.

The legislative history shows that a prime object of the statute of limitations was to safeguard a union security agreement from invalidation because of alleged illegality in its inception unless a charge had been filed within the prescribed time measured from the date of the execution of the agreement. The Senate

Report observed in its comment upon Section 10(b) that (S. Rep. No. 105, 80th Cong., 1st Sess., 26, in 1 Leg. Hist. 432):

> The principal substantive change in this section is a provision for a 6-month period of limitations upon the filing of charges. The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, *and a rider to the current appropriations bill (which if this amendment was adopted would no longer be necessary) contains a 3-month period of limitations with respect to certain kinds of unfair labor practices.* [Emphasis supplied.]

The rider to the then current appropriations bill to which the Senate Report referred provided that:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof, between management and labor *which has been in existence for three months or longer without complaint being filed* by an employee or employees of such plant: Provided, That, hereafter, notice of such agreement or renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at and accessible place of such agreement where said agreement shall be open for inspection by any interested person: Provided, further, that these limitations shall

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[9] The Senate Report is dated April 17, 1947. The appropriations bill pertaining to the NLRB then extant was H.R. 2709, 80th Cong., 1st Sess., which had been reported by the House Appropriations Committee on March 21, 1947, 28 days before the Senate Report issued. The Senate referred this appropriations bill to its Appropriations Committee on March 26, 1947, 22 days before the Senate Report issued. See Appendix A, *infra* pp. 101-103.

> not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code. [Emphasis supplied.]

Under this rider, the three-month limitations period it prescribed began to run from the time the agreement came into "existence," and if, "without complaint being filed by an employee or employees," the agreement "has been in existence for three months or longer," prosecution of a "complaint case arising over . . . [that] agreement" was barred. This rider was not only part of the then current appropriations bill but it had appeared in substantially the same form in each of the preceding NLRB Appropriation Acts beginning with that for the fiscal year ending June 30, 1944.[10] The NLRB Appropriation Act, 1949 (62 Stat. 404), the first to be enacted after the effective date of the 1947 Taft-Hartley amendments, no longer contained a limitations rider, and none has since been included. The elimination of the riders was of course the consequence of the adoption of the general six-month limitations period in Section 10(b); as the Senate Report stated, upon the adoption of Section 10(b) the limitations riders upon appropriations "would no longer be necessary."

It is thus clear that, even before the adoption of Section 10(b), limitations were applicable to bar the invalidation of an agreement if a charge had not been filed within three months of the execution of the agreement and the other conditions of the rider were met.

[10] NLRB Appropriation Act, 1944, 57 Stat. 515; NLRB Appropriation Act, 1945, 58 Stat. 567; NLRB Appropriation Act, 1946, 59 Stat. 477; NLRB Appropriation Act, 1947, 60 Stat. 698.

As stated, the first limitations rider upon the Board's appropriations had been enacted on July 12, 1943, for the fiscal year ending June 30, 1944, and it provided that (NLRB Appropriation Act, 1944, 57 Stat. 515):

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: *Provided*, That hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person.

The immediate impetus to the adoption of this rider was the pendency of proceedings before the Board looking towards invalidation of closed shop agreements covering the employees of the Kaiser shipyards on the Pacific Coast. The vulnerability of the agreements lay in that, while executed at a time when the number of employees in the unit numbered about 60, they were applied when the complement mushroomed to the neighborhood of 20,000 to 30,000; relevant to this situation is the accepted rule that a collective bargaining agreement cannot validly grant exclusive recognition to a union at a time when "a group of employees is rapidly expanding, so that the initial work force cannot truly represent more than a small fraction of the contemplated total. . . ."[11] The rider was enacted to

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[11] *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F.2d 141, 144 (C.A. 9). Section 705(a), Title VII, Labor-Management Reporting and Disclosure Act, 1959, changes this rule

prevent disruption of the agreements at the Kaiser shipyards, and the means adopted was to insulate from complaint any agreements "in existence for three months or longer" without a charge filed. 89 Cong. Rec. 6566-69, 6949-54, 7029-34; N.L.R.B., Eighth Annual Report, 7 (1943); N.L.R.B., Ninth Annual Report, 4 (1944).

The language of the rider was general and designedly so; its impact was not meant to be confined to the Kaiser situation, but to assure that "labor relations should be stabilized all over the country" (89 Cong. Rec. 6568), and to this end to "adopt the principle of stabilization of union control in the plants where particular unions are now in control" (89 Cong. Rec. 7033). See also 89 Cong. Rec. 6566, 6567, 6953, 6954, 7029, 7034. As stated by the Comptroller General in his authoritative decision of October 21, 1943 (B-37051), after full quotation of relevant excerpts from the legislative history, "the Congress intended that existing agreements shall remain in effect and not be the subject of inquiry in proceedings by the National Labor Relations Board during the fiscal year 1944, regardless of the nature of the unfair labor practice that may be in issue in a particular case." 12 LRRM 2227, 2232. As explained by the Board, the rider "operates to preclude the Board from taking action to prevent unfair labor practices in any complaint case where there is involved an agreement between management and labor which has been in existence for 3 months or longer without charges being filed, wholly without regard to the illegality of

in the building and construction industry by authorizing entry into prehire agreements in that industry. S. Rep. No. 187, 86th Cong., 1st Sess., 27-29, 55-56; H. Rep. No. 741, 86th Cong., 1st Sess., 19-20, 50.

the contract or the nature of the unfair labor practices which have been committed." N.L.R.B., Eighth Annual Report, 7 (1943). The gist of the matter was succinctly put by Congressman Tarver (89 Cong. Rec. 6953):

> . . . we should enact this proviso and stop this squabbling out there on the Pacific Coast or anywhere else in the country, especially when the contract, *whether it was proper at the time of its inception or not*, has been in effect for three months without complaint. [Emphasis supplied.]

The administrative interpretation and application of the limitations riders left no doubt that, regardless of the enforcement of the union security agreements, the agreements were nevertheless invulnerable to invalidation unless a charge had been filed within the requisite three months from their inception and the other conditions of the riders had been met. The Board dismissed at least fourteen cases in which the claim was that discharges made pursuant to agreements were discriminatory. N.L.R.B., Eighth Annual Report, 10 (1943). The Board explained that (*Id.* at 8):

> Since it [the limitations rider] serves in many cases to protect illegal contracts, the amendment also protects unlawful conduct which stems from such contracts. Thus it may operate to sanction the discharge of an employee pursuant to a closed-shop contract, despite the fact that such contract is plainly illegal under the terms of the proviso to Section 8(3) of the Act. And in this regard, it is immaterial whether the illegality of the contract is due to the fact that it is made with a minority union or to the fact that it is made with a union which has been maintained or assisted by unfair labor practices on the part of the employer. By virtue of the amendment, the discharge is privi-

leged in either case unless a charge is filed within 3 months after the execution of the contract.

This was also the interpretation expressed by the Board in a release issued by it on April 20, 1944 in which for the guidance of the public it explained its views of assumed cases. 12 LRRM 2232-2241. It is worthwhile setting forth the first two cases posited by the Board. Case 1 and the Board's suggested answer are (12 LRRM 2232-33):

> Case 1. Union A starts to organize the employees of the X Manufacturing Company with a view to becoming their bargaining representative under Section 9(a) of the Act. The Company, not wishing to deal with Union A, calls in a business agent of Union B, and signs a closed-shop agreement with that organization, although it knows that it represents only a small minority of its employees. Jones, an employee who has been active in promoting the cause of Union A, refuses to join Union B and four months later he is discharged. He files a charge on the next day.
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> Suggested Answer of NLRB: In the absence of the limitation in the Appropriations Act, the Board would have jurisdiction to hold his discharge a violation of Section 8(3) since it discouraged membership in one labor organization and encouraged membership in another. Moreover, although the proviso to Section 8(3) recognizes closed-shop agreements, the agreement in this case would not be a defense since it was not made with a representative designated by the majority of the employees in the appropriate bargaining unit. Under the Appropriations Act, however, the Board would have no jurisdiction since the charge was not filed until after three months subsequent to the execution of the contract. It is true that the particular unfair labor practice of which Jones com-

plained occurred just the day before the charge was filed, but to deem this a violation of the Act would necessitate passing upon the legality of the closed-shop contract.

In this case the Board clearly recognized that, although the agreement was made with a union that "represents only a small minority of the employees," the discharge under it could not be litigated, for to do so "would necessitate passing upon the legality of the closed-shop contract," a matter no longer open in that the charge had not been "filed until after three months subsequent to the execution of the contract."

Case 2 and the Board's suggested answer are also illuminating (12 LRRM 223):

Case 2: Union A starts to organize the employees of the X Manufacturing Company with a view to becoming their bargaining representative under Section 9(a) of the Act. The Company warns its employees not to join Union A, but invites Union B to send organizers into its plant, solicit for membership among its employees, and instructs its foremen to tell employees to join Union B. Union B obtains applications for membership from a majority of the employees and a closed-shop agreement is executed between this organization and the Company. Four months after the agreement is signed, Union A files a charge alleging that the Company has interfered with the right of its employees to self-organization and the right to engage in concerted activities. The charges does not mention the closed-shop agreement.

Suggested Answer of NLRB: In the absence of the limitation in the Appropriations Act the Board would have jurisdiction to deem the Company in violation of Section 8(3), the closed-shop

> agreement would not have been a defense, since it was executed with an 'assisted' organization. But it is our view, however, that the Appropriations Act would prohibit taking jurisdiction even on the basis of the 8(1) charge since it indirectly places in issue the legality of the agreement with Union B to the same extent as would a charge alleging domination and support of Union B under Section 8(2) of the Act. As the Comptroller General stated in his opinion of Oct. 21, 1943, B-37051 "it cannot be said that Congress intended to restrict its (the Appropriations Act's) application to those cases where the agreement is directly attacked; nor, as a matter of fact, does it appear that the Congress even considered the extent to which the validity of the agreement must be in issue in a complaint case." The Board's customary remedy in cases such as the instant one is to direct the Company to cease recognizing Union B until it shall have been certified by the Board and to cease giving effect to the agreement with it. The direct result of such an order is the abrogation of the existing agreement to the same extent as a disestablishment order in an 8(2) case.

The Board clearly recognized that, the charge having been filed more than three months "after the agreement is signed," the Board was powerless to place "in issue the legality of the agreement" or to enter an order resulting in the "abrogation of the existing agreement."

The NLRB Appropriations Act, 1945, for the fiscal year ending June 30, 1945 (58 Stat. 567), continued the 1944 limitations rider with certain amendments. The principal amendment was to except agreements with company-dominated unions from the operation of

the rider.[12] In the amended form, the rider was identical to that contained in "the current appropriations bill" to which the Senate Report referred in explaining the limitations provision in Section 10(b) (*supra*, p. 36), and in this identical amended form, the rider had also been incorporated in the intervening NLRB Appropriation Acts for 1946 (59 Stat. 377) and 1947 (60 Stat. 698). The Board recognized that under the 1945 amended form, as under the 1944 original form, once the three-month period had run without a charge filed, there was a bar to prosecution of complaints looking to invalidation of "contracts with unions who do not represent a majority of the employees covered by such contracts." N.L.R.B., Ninth Annual Report, 6 (1944).

Thus, when Congress enacted the limitations provision of Section 10(b), the question of applying limitations to union security agreements allegedly unlawful at inception was not *res nova*. On the contrary, begin-

[12] As explained by the Board, "While in general the 1945 limitation reads like the 1944 limitation, it differs from the old amendment in three important respects: (1) Whereas the previous limitation applied to company-dominated union cases, the present limitation leaves the Board free to proceed in all such cases; (2) under the 1945 amendment, in contrast to the 1944 limitation, the renewal of an agreement, even though by virtue of the operation of an automatic renewal clause, starts anew the running of the 3-month period during which a charge attacking the agreement may be filed; and (3) while under the old amendment a charge filed by any individual or labor organization would suffice, a charge will not prevent the operation of the present limitation unless it is filed by 'an employee or employees' of the plant covered by the agreement in question." N.L.R.B., Ninth Annual Report, 5-6 (1944). As to item (3), the Board thereafter took the view, concurred in by the Comptroller General, that a charge filed by a labor organization, authorized by an employee to do so, validly invoked the Board's jurisdiction. Opinion of the Comptroller General, March 14, 1945, 16 LRRM 2529.

ning July 12, 1943 (*supra*, p. 38), through the medium of the appropriation riders, Congress had safeguarded such agreements from invalidation because of alleged illegality at inception if no charge had been filed within three months of entry into the agreement and the other conditions of the riders had been met. The six-month limitation of Section 10(b) applicable to all unfair labor practices replaced the three-month limitation of the riders applicable to agreements. As the Senate Report stated, upon adoption of Section 10(b) the limitations riders upon the Board's appropriations "would no longer be necessary" (*supra*, p. 36). To say, therefore, that Section 10(b) does not protect union security agreements allegedly invalid at inception not only renders untrue the statement that the "riders would no longer be necessary." It also requires the conclusion that, when Congress for the first time in 1947 enacted a statute of limitations having general applicability to all unfair labor practices, it was at the same time and by that very act eliminating the already existing applicability of limitations to union-security agreements. This is not possible.

To overcome the relevance of the appropriations riders we anticipate that the Board may make two arguments. We turn to these:

1. While "the *current* appropriations bill" to which the Senate Report referred, and the preceding Appropriation Acts, pertained to an agreement "between management and labor which has been in existence for three months or longer without complaint being filed," the NLRB Appropriations Act, 1948, for the fiscal year ending June 30, 1948 (61 Stat. 276), substituted the words "an employer and a labor organization which represents a majority of his employees in

an appropriate bargaining unit" for the words "management and labor." The 1948 Appropriation Act was passed on July 8, 1947, *after* the Taft-Hartley amendments were enacted (June 23, 1947) but before they became effective (August 22, 1947; Sec. 104), and was the last NLRB Appropriation Act to contain a limitations rider.

The Board contends that since the last limitations rider was applicable to agreements between "an employer and a labor organization which represents a majority of his employees in an appropriate bargaining unit," Congress cannot be thought in Section 10(b) to have "granted immunity to contracts regardless of the union's majority status" (Bd. br. in opp. to cert. p. 11). We do not pause to consider the soundness of the assumption that the 1948 limitations rider is not applicable to an agreement with a union not the designee of a majority when executed—an interpretation which renders the rider meaningless and which the Board in the past expressly refrained from adopting.[13] For the short answer is that Section 10(b) does not relate to the 1948 limitations rider as enacted, but to the form which appeared in "the *current* appropriations bill" and which was identical to the preceding limitations riders. The Senate Report, which stated that under the new Section 10(b) limitation the "rider to the current appropriations bill . ... would no longer be necessary" (*supra*, p. 36), is dated April 17, 1947. The *only* appropriations bill pertaining to the NLRB then extant was H. R. 2700, 80th Cong., 1st Sess., which had been reported by the House Appropriations Com-

[13] *Guy F. Atkinson Co.*, 90 NLRB 143, 146, n. 11, declining to pass upon this among other bases of the examiner's findings *id.* at 157-59, enforcement denied, 195 F.2d 141 (C.A. 9).

mittee on March 21, 1947, 28 days *before* the Senate Report issued. H. Rep. No. 178, 80th Cong., 1st Sess. It was *this* appropriations bill which the Senate referred to its Appropriations Committee on March 26, 1947, 23 days *before* the Senate Report issued (*infra*, p. 102). And the limitations rider in this appropriations bill contained the exact same language—"an agreement . . . between management and labor"—which had existed in all the four preceding appropriation acts. It was to the rider in *this* appropriations bill—which was "the *current* appropriations bill"—that the Senate Report necessarily referred, it being the only one in being when the Senate Report was drafted and issued. The Senate Report thus related the limitations provision of Section 10(b) precisely to those limitations riders which had from the beginning precluded the use of NLRB funds "in any way in connection with a complaint case arising over an agreement, or a renewal thereof, *between management and labor* which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant. . . ."

And this of course is the only view which makes any sense of the limitations provision of Sestion 10(b), of the Senate Report which explains it, and of the history which precedes it. It is to this history which we must look, particularly in view of the extensive legislative debate which preceded the original adoption of the limitations riders and the ensuing record of administrative interpretation and application. By the time the 1948 limitations rider was enacted, Section 10(b) had already been passed, the future applicability of limitations to unfair labor pratices had already been

legislatively settled, and the scope of the 1948 limitations rider as enacted was utterly academic.[14]

2. The Board's second argument seems to come to this: The limitations provision of Section 10(b) does not run as to an agreement invalid on its face while it is in effect; the limitations riders in the appropriation acts would have run as to such an agreement; hence the limitations riders, having "far broader sweep than Section 10(b)," do not provide a valid source for the interpretation of Section 10(b). (Bd. br. in opp. to cert. pp. 10-11.)

The argument is fallacious. The limitations riders operated during the period of the Wagner Act. Under that act a labor organization was permitted as a matter of federal law maximum union security in the form of a closed shop agreement.[15] During that period, therefore, the question of the invalidity of an agreement on its face could not ordinarily arise. Obviously the limitations riders were not drafted with an eye to a problem which did not then exist. It thus cannot be said, as the Board would have it, that the limitations riders had "broader sweep" than Section 10(b), when all that can be said is that they were not addressed to a problem which did not exist.

But the problem which did exist under the Wagner Act, and which continued to exist under the Taft-Hartley Act, was the execution of an agreement with a union which did not represent a majority. And the riders which were operative prior to the enactment of

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[14] For convenience, we attach as an appendix to this brief a full statement of the evolution of the 1948 NLRB Appropriation Act, *infra*, pp. 101-105.

[15] *Colgate-Palmolive-Peet Co.* v. *National Labor Relations Board*, 338 U.S. 355.

the Taft-Hartley amendments were directed precisely to this problem and did resolve it in favor of having limitations run from the inception of the agreement. In interpreting the new Section 10(b) limitations provision, the riders' precedent treatment of the problem which did exist cannot be sapped of relevance because the riders did not treat with a problem which did not exist.

D. The Precedents Establish That An Event Within The Allowable Six-Month Period Cannot Be Converted Into An Unfair Labor Practice In Reliance Upon An Unfair Labor Practice Which Preceded The Six-Month Period.

As we have said, but for the barred unfair labor practice of August 10, 1954, no event within the allowable six-month period could be found to be a violation. The precedents establish that a benign event within the allowable six-month period cannot be converted into an unfair labor practice in reliance upon a barred violation which occurred before then.

1. An employer denied the application for reinstatement made by strikers who had been permanently replaced during the strike. The denial was proper if the strike was economic in nature; it was improper if the strike was caused or prolonged by unfair labor practices.[15a] Whether it was an economic or an unfair

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[15a] "It is settled law that where the strike is an economic one the employer can replace the striking employees with others in an effort to carry on the business and is not required to discharge those hired to fill the places of strikers upon the election of the latter to resume employment. * * * However, if the strike is caused by an unfair labor practice, the striking employees are entitled to reinstatement upon the termination of the strike." *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F.2d 898, 906 (C.A. 6), certiorari granted on other questions, 353 U.S. 907, affirmed in part and reversed in part, 356 U.S. 342.

labor practice strike depended upon whether it was caused by an unlawful refusal to bargain. But the refusal to bargain preceding the strike occurred more than six months before the filing and service of the charge. The Board dismissed the complaint alleging the discriminatory refusal to reinstate the strikers because it was based upon an unfair labor practice which antedated the charge by more than six months. *Greenville Cotton Oil Co.*, 92 NLRB 1033. The Board explained that (*id.* at 1034-1035):

> Only if . . . [the strikers] can show that their strike was caused or prolonged by unfair labor practices are they entitled to preferred treatment.
>
> But it is just such a showing which the proviso to Section 10(b) expressly prohibits, for any finding of an unfair labor practice strike here would necessarily be "based upon" unfair labor practices occurring more than 6 months prior to the charge. Because the proviso thus precludes finding an unfair labor practice strike and the consequent discriminatory refusal to reinstate the strikers, we must dismiss this allegation of the complaint.

The Court of Appeals for the Fifth Circuit affirmed, stating that "we agree with the Board that what the union is in effect seeking to do is to use the happenings after June 18th [the date six months preceding the filing of the charge] as mere connective incidents wherewith to bridge the fatal gap in time between the happenings really relied on as unfair labor practices and the six months' bar, hoping thereby to cross over the six months' barrier which would otherwise preclude the charge." *American Federation of Grain Millers* v. *National Labor Relations Board*, 197 F. 2d 451, 454 (C.A. 5).

The operative facts in *Grain Millers* and the instant case are identical. In *Grain Millers*, the act antedating the six-month period is the employer's refusal to bargain with the union; in this case, the act is the employer's recognizing and contracting with the union when it does not have a majority. Both acts are unmistakable unfair labor practices; both acts are indispensable predicates for finding a violation within the six-month period. And here, as there, because "the happenings really relied on as unfair labor practices" antedated the filing of the charge by more than six months, Section 10(b) bars their importation into the allowable six-month period.

The court below cites *Grain Millers* for the proposition that the "Board is prohibited . . . from making any legal conclusion with regard to events outside the statutory period," and it then seeks to distinguish the instant case with the statement that: "Although the Board in the instant case must look to the facts surrounding the making of the 1954 contract, its ultimate holding depends on their mere *existence* rather than on ascribing legal significance to those facts standing alone" (R. 474, emphasis in original). This verbalism will not withstand analysis. The finding in this case is that, on August 10, 1954, "since the IAM was not the majority representative, the respondent Company, regardless of its motives, illegally assisted and supported the IAM when it granted recognition to and contracted with the IAM" (R. 413). The Board could hardly have been more unequivocal in "making" a "legal conclusion with regard to events outside the statutory period"; and the events within the period are converted into an unfair labor practice precisely because of the "legal significance" ascribed to the events

outside the period. The relevant fact is not that the IAM did not have a majority on August 10, 1954; there is in every case a point in time prior to the recognition of a union as the representative when it does not have a majority and is in the process of mustering one. The relevant fact is that, at a time when the IAM did not have a majority, the Company recognized and contracted with it as the representative. And this fact is relevant precisely because it constitutes the unfair labor practice of rendering unlawful assistance to a union and abridging the employees' exercise of a free choice. It is solely because of this unfair labor practice that the Board is able to say that "It *follows* therefore, and we find, . . . that the Respondent Company violated Section 8(a)(1), (2), and (3) and the Respondent Unions 8(b)(1)(A) and (2) by maintaining in effect the 1954 agreement and by executing and maintaining in effect the 1955 agreement, both of which contained unlawful union security clauses." (R. 437, emphasis supplied.) Eliminate this unfair labor practice outside the period and nothing follows within the six-month period. It is thus impossible to ascribe greater "legal significance" to the barred unfair labor practice.

2. An employer allegedly formed, supported, and dominated a labor organization. But the evidence to establish the allegation antedated the filing and service of the charge by more than six months. Section 10(b) of the Act operates, the Board holds, to preclude a finding of formation, support, and domination of the organization by the employer. *Universal Oil Products Co.*, 108 NLRB 68; *Armco Drainage & Metal Products, Inc.*, 106 NLRB 725, 730-731, enforced as modified, 220 F. 2d 573 (C.A. 6), certiorari denied, 350 U.S. 838;

Tennessee Knitting Mills, 88 NLRB 1103, 1104-1105. This is so despite the fact that the organization continues to exist and function within the allowable six-month period. The taint in its origin nevertheless cannot be reached, because it is an unfair labor practice antedating the period.

The instant case occupies an *a fortiori* position. While the relationship between the Company and the unions continues to exist and function within the allowable six-month period, the only blemish relates to an alleged defect in the inception of the relationship antedating the period. And the unions here, as the Board found, were not sponsored or dominated by the Company (R. 413-414). If a complaint cannot be based upon the alleged dominated origin of a labor organization once the six months has run, how much less can a complaint be based upon the alleged defective inception of a relationship with an unsponsored and undominated labor organization.

3. These two situations are representative of a host of others in which it has been held that the six-month period of limitations operates as a bar: the alleged discriminatory refusal to grant a wage increase to employees within the allowable period based exclusively upon evidence of discrimination antedating the period (*News Printing Co., Inc.*, 116 NLRB 210); the alleged discriminatory layoff of an employee within the allowable period based exclusively upon evidence of a discriminatory reduction in his seniority antedating the period (*Bowen Products, Inc.*, 113 NLRB 731); and the alleged discriminatory denial of an application for full reinstatement within the allowable period based exclusively upon the employee's discriminatory discharge antedating the period (*National Labor Rela-*

tions Board v. *Pennwoven, Inc.*, 194 F.2d 521 (C.A. 3); *National Labor Relations Board* v. *Childs Co.*, 195 F.2d 617 (C.A. 2)). In all these cases, as in this case, unobjectionable conduct within the period was sought to be converted into an unfair labor practice in reliance upon objectionable conduct antedating the period. There, as here, Section 10(b) operates as a bar.

E. The Theory Of The Board Is Based Upon A Misapplication Of Two Concepts: (1) Section 10(b) Is A Statute Of Limitations And Not A Rule Of Evidence: (2) Continuing Violation.

To support its conclusion that Section 10(b) does not operate as a bar, the Board sloganizes on two concepts: (1) Section 10(b) is a statute of limitations, not a rule of evidence; (2) continuing violation.

1. *The concept that Section 10(b) is a statute of limitations and not a rule of evidence:* The Board states that Section 10(b) is a statute of limitations and not a rule of evidence (R. 432-433); that it therefore does not bar receipt in evidence of events antedating the allowable six-month period (R. 433); that consideration of that antedating evidence establishes that the Company recognized and contracted with the IAM when it did not have a majority and for that reason the union security agreement was invalid at inception (R. 434-435); and, therefore, by reason of this initial invalidity, maintenance of the original agreement and execution and maintenance of the successor agreement within the six-month period may be found to be an unfair labor practice (R. 436-437).

To reason in this fashion is to end with the conclusion that Section 10(b) is not only not a rule of evidence, it is not a statute of limitations either. For

under this view, whenever conduct within the allowable period is connected with conduct antedating the period, as is virtually always the case, the conduct outside the period may be adjudicated an unfair labor practice in order to furnish the predicate for a violation within the period. And the order which the Board would then enter is in every significant respect identical to the order which it would have entered had a timely charge been filed and served in relation to the earlier conduct.[16] The conclusion is inescapable that this interpretation "would in effect render Section 10(b) meaningless." *Bowen Products Corp.*, 113 NLRB 731, 732.

The concept that "Section 10(b) enacts a statute of limitations and not a rule of evidence" (*Axelson Manufacturing Co.*, 88 NLRB 761, 766) has no such engulfing meaning. It simply means that Section 10(b) does not erect a wall shutting from view the world as it existed before the six-month period. If a refusal to bargain is alleged, obviously the union's certification a year before is admissible to establish its representative status; if a discriminatory discharge is alleged, obviously the employee's exemplary work record for many years before is admissible to show that the inefficiency assigned by the employer as the

[16] The only concession which the order in this case makes to Section 10(b) as a statute of limitations is that, in requiring the reimbursement to the employees of the checked-off initiation fees and dues, the sums collected before the allowable six-month period are excluded (R. 442, 415). As the Court of Appeals for the Third Circuit stated, in considering whether such a limited exclusion gave sufficient scope to Section 10(b), "We do not think that such an interpretation of the statute accomplishes the legislative purposes." *National Labor Relations Board* v. *Pennwoven, Inc.*, 194 F.2d 521, 525.

reason for the dismissal is an artifice. Even evidence of unfair labor practices as such may be received antedating the six-month period. But such evidence is "admissible *only as a background for interpretation or clarification*" (*Greenville Cotton Oil Co.*, 92 NLRB 1033, 1034, n. 6, affirmed, 197 F.2d 451 (C.A. 5)[17] (emphasis supplied)); it may not be given "independent and controlling weight" (*Universal Oil Products Co.*, 108 NLRB 68, 69-70, and cases cited *infra*, pp. 56-57).

It is this vital qualification that the Board ignores. It gives controlling significance to its finding that on August 10, 1954 the Company recognized and contracted with the IAM when it did not have a majority. It is this unfair labor practice that is the exclusive foundation for its conclusion that offenses occurred within the allowable period. Evidence of unfair labor practices antedating the period is thus used, not as background evidence, but as the sole evidence upon which to predicate the violations found.

"But, because of Section 10(b), no unfair labor practice finding may be made to rest upon the bare presumption of continuity. More is required, and that in the form of independent proof that within the 10(b) period the Respondent engaged in some affirmative conduct that was itself illegal. . . ." *Local Union No. 1418, General Longshore Workers*, 102 NLRB 720, 730, enforced, 212 F.2d 846 (C.A. 5). "Events before that time may be considered for the purpose

[17] See also, *National Labor Relations Board* v. *Clausen*, 188 F.2d 439, 443 (C.A. 3), cert. denied, 342 U.S. 868; *National Labor Relations Board* v. *General Shoe Corporation*, 192 F.2d 504, 507 (C.A. 6), cert. denied, 343 U.S. 904; *Paramount Cap Mfg. Co.* v. *National Labor Relations Board*, 260 F.2d 109, 112-113 (C.A. 8).

of elucidating and explaining the character and quality of alleged illegal conduct occurring within the limitations period, but unless some illegal conduct is independently established within that period, such earlier events may not support an unfair labor practice finding." *Armco Drainage & Metal Products, Inc.*, 106 NLRB 725, 730, enforced as modified, 220 F.2d 573 (C.A. 6), cert. denied, 350 U.S. 838. And so, "While evidence . . . concerning conduct which occurred prior to the statutory 6-month period may be utilized as background evidence to evaluate a Respondent's subsequent conduct, it is well established that *Section 10(b) of the Act precludes the Board from giving independent and controlling weight to such evidence.*" *News Printing Co., Inc.*, 116 NLRB 210, 212 (emphasis supplied). See also, *Universal Oil Products Co.*, 108 NLRB 68, 69-70.

Thus the proper line is to receive the events antedating the six-month period as "background evidence" but not to give them "independent and controlling weight." Only in this way can the dual objectives be served of affording maximum intelligibility to the events within the period while at the same time effectively preserving the function of Section 10(b) as a statute of limitations. The court below purported to recognize that the receipt of evidence antedating the six-month period is "subject to the important qualification that testimony as to such barred events may be received only as background evidence and may not be given independent significance" (R. 471).[18]

[18] Quoting from this Court's decision in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 705, the court below stated that this was the "important qualification" upon the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from

But this was a promise to the ear broken to the hope. For the court gave the barred unfair labor practice just that "independent significance" which it stated was precluded.

For, to repeat, the controlling event in this case is the Company's act of recognizing and contracting with the IAM on August 10, 1954 when the IAM did not have a majority. It is this barred unfair labor practice, which occurred ten months before the first charge was filed, that is the exclusive foundation for the conclusion that offenses occurred within the allowable period. But for this barred act there is *no* evidence of a violation within the six-month period. The unfair labor practice antedating the period is thus used, not as background evidence, but as the sole evidence upon which to predicate the violation found. The barred event was given more than "independent significance," it was given exclusive significance. This distortion is wholly outside the justification for receiving evidence of events antedating the allowable period. It nullifies the prescriptive purpose of Section 10(b).

2. *Continuing violation:* The Board reasons that, "when parties agree to a union security arrangement

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forming the basis for a suit, may nevertheless be introduced to show the purpose and character of the particular transactions under scrutiny" (R. 471). The court below should also have observed the qualification stated in the preceding sentence of this Court's opinion in *Cement Institute:* "The Commission did not make its findings of post-1929 combination, in whole or in part, on the premise that any of respondents' pre-1929 or NRA code activities *were illegal*" (333 U.S. at 704-705, emphasis supplied). In this case, on the contrary, the Board did premise its findings within the six-month period upon its finding that the conduct preceding the six-month period was "illegal." Moreover, neither *Cement Institute*, nor the two cases cited in it, presented limitations questions.

which does not conform to the requirements of the proviso to Section 8(a)(3), they violate the Act not only when they agree to the arrangement but every day that they continue the unlawful arrangement in effect" (R. 434). The Board further states that it "can perceive no difference in illegality between a contract unlawful on its face, that is, one prescribing a form of union security prohibited by the Statute, and a contract invalid because certain requisites to the making of a valid contract have not been complied with. In both instances the invalidity begins at a point in time and continues so long as the unlawful contract remains in effect" *(ibid.)*. The Board concludes that, as Section 10(b) does not bar issuance of a complaint based on continuance in effect of an agreement *invalid on its face* but executed more than six months before the filing of the charge, the same must be true of an agreement *valid on its face* but illegal because executed when the contracting union did not have a majority (R. 434-435).

The distinction between the two is obvious and decisive. With an agreement invalid on its face, no evidence but the agreement is needed to establish the violation of maintaining an unlawful arrangement in effect. No proof of events antedating the allowable six-month period is requisite; no question arises of reliance upon a barred unfair labor practice to establish the violation. In this context the concept of continuing violation is relevant only in refutation of the defense that because the arrangement was inaugurated more than six months before the charge was filed its current maintenance in effect is immune. To that argument the simple and direct answer is that the illegality, patent on the face of the agreement and

requiring no proof of antecedent events, did not cease with its inception but continued to date.

Not so with an agreement valid on its face. It is not possible to say of such an agreement that on its face its maintenance in effect is a continuing violation. Only proof of illegality in its inception would furnish the predicate for a statement that it is illegal in its continuance. And it is precisely this showing that Section 10(b) operates to preclude when establishment of illegality in inception depends upon proof of an unfair labor practice antedating the filing of the charge by more than six months. That is this case.

The cogent statement of the distinction by the dissenting members of the Board bears repetition (R. 450-452):

> Our colleagues say that in both types of situations involving unlawful union-security agreements, the invalidity begins at a point in time and continues to exist while the agreement remains in effect, the distinction between the two types being in the manner of proving illegality. However, this approach seems to overlook the further distinction that stems from the reasons for the invalidity of the two types of agreements. Thus, in the first type of situation, where the reason for the invalidity lies in the language of the agreement, the circumstances which cause the agreement to be invalid not only existed at the point of time in the past when the agreement was executed, but continue to exist as a present reason for invalidity each day that the agreement continues in effect. Although the continued invalidity of the agreement may therefore in a sense be related to its initial invalidity, such continued invalidity is not based solely on the initial invalidity but has a continuing independent basis. For this reason, the unfair labor practices involved in the main-

tenance of such an agreement may be established merely by proof of maintenance at any point of time, without reference to the circumstances surrounding its execution. Consequently, the fact that the charges may have been filed more than 6 months after the execution of such an agreement can have no effect on the Board's power to find, based upon evidence as to the maintenance of the agreement within 6 months of the filing of the charges, that such maintenance was an unfair labor practice.

On the other hand, in the second type of situation involved herein, where the reason for the invalidity assertedly lies in a failure in executing the agreement to comply with some or all of the requisites for making a valid union-security agreement, the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis. Accordingly, although an agreement invalid in its inception may continue to be invalid throughout its life, the fact of its invalidity and the consequent existence of unfair labor practices cannot be established merely by proof that the agreement was being maintained at some point in time subsequent to its execution, but can only be established by proof of the facts surrounding its execution in the past, which created the initial invalidity. When as here, therefore, the charges are filed more than 6 months after the execution of the agreement, proof of its invalidity and the consequent unfair labor practices can only be established by reliance on evidence of events which occurred more than 6 months before the filing of the charge. This Congress expressly precluded by Section 10(b)

The court below seeks to finesse the difference. It states that within the six-month period union membership and dues payment were "contractually compelled"; that these "unfair practices . . . are positive acts which are both continued and repeated"; and "where the violations are of this character, *i.e.*, continued and repeated," it is "appropriate for the Board to rely on events outside the statutory period to establish a critical element of proof of the offense" (R. 472). The Board espoused no such notion. And for obvious reasons. For what the court below describes as "unfair practices" and "violations" are the normal and legitimate attributes of the administration of any union security agreement. The very reason for being of a union security agreement is to require the employee to obtain union membership by paying initiation fees and to retain union membership in good standing by paying periodic dues. This the statute permits in express terms. (Proviso to Section 8(a)(3); *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40-42). In a study of 1,653 collective bargaining agreements, covering 5,549,000 workers, the Bureau of Labor Statistics found that union security was provided for in 75 per cent of the agreements, either by a union shop provision (63 per cent) or by a maintenance of membership clause (12 per cent).[19] It would come as a shocking surprise to the parties to these agreements, and the workers covered by them, to learn that union membership and dues payment pursuant to the union security terms of the agreements constitute "unfair practices" and "violations." Union membership and dues payment pursu-

[19] Hammond and Nix, *Union-Status Provisions in Collective Agreements, 1952*, 76 Monthly Labor Review 383, 384-385 (1953).

ant to the terms of a union security agreement valid on its face can be said to be "unfair practices" and "violations" only by showing that one of the conditions requisite to entry into the agreement has not been met. It is this showing that Section 10(b) precludes when execution of the agreement antedates the filing of the charge by more than six months. In short, the court below would justify piercing the six-month period by calling the acts involved in the administration of a union security agreement "unfair practices" and "violations", whereas the only legal basis for characterizing the acts as "unfair practices" or "violations" arises only after the six-month period has already been breached. This is a brilliant example of lifting oneself by one's own bootstraps.

The bootstrap character of the argument is further shown by the fact that it fails to account for much of the Board's findings and order. The Board found that the Company violated Section 8(a)(1) and (2) *independently* of the union security provisions of the agreements. Only the Company's violation of Section 8(a)(3) and the unions' violation of Sections 8(b)(1)(A) and (2) were based on the union security provisions.

Thus, the examiner found that, "since the IAM was not the majority representative, the Respondent Company, regardless of its motives, illegally assisted and supported the IAM when it granted recognition to and contracted with the IAM" (R. 413). In a footnote to that finding, the examiner stated (R. 413, n. 98):

> See *Adams, D. Goettl and Gus Goettl d/b/a International Metal Products Company*, 104 NLRB 1076, 1077, wherein the Board found violations of Section 8(a)(1) and (2) of the Act, in a situa-

tion where the contract does *not* appear to have included a union-security provision. The holding of the Board is based squarely on the fact that the contracting union "was not the majority representative of the employees involved when recognition was granted and the contract executed." [Emphasis supplied.][20]

Finding a violation of Section 8(a)(1) and (2), based solely upon an employer's recognition of and execution of a contract with a union that does not represent a majority, is old law. "The recognition of, and execution of a collective bargaining contract with, a minority union constitutes unlawful assistance. . . ." *Berhard-Altmann Texas Corp.*, 122 NLRB No. 142, 43 LRRM 1283, 1284; see also, *International Harvester Co.*, 87 NLRB 1123, 1125; *Bowman Transportation, Inc.*, 112 NLRB 387, 399-400, 113 NLRB 786, affirmed as modified, 355 U.S. 453. The inclusion of a union security provision in the agreement accents but is not essential to the violation. "Even without a contractual requirement for compulsory union membership, an employer illegally assists and supports a labor organization by granting it exclusive recognition when he knows it does not represent a majority in an appropriate bargaining unit at the time the grant is made.

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[20] In this case, decided on February 6, 1959, the Board, for the first time, decided that such conduct, in addition to being a violation of Section 8(a)(1) and (2) by the employer, was also a violation of Section 8(b)(1)(A) by the union. Although disclaimed by the Board majority, the dissenting member effectively demonstrates that the finding of a violation of Section 8(b)(1)(A) is based on the Board's recent expansion of the scope of this section (43 LRRM at 1285-86), the validity of which is before this Court in *National Labor Relations Board* v. *Drivers Local Union No. 639*, 356 U.S. 965, granting certiorari to review the judgment in 43 LRRM 2156 (C. A. D. C.), denying enforcement of the order in *Curtis Brothers, Inc.*, 119 NLRB 232.

The illegal assistance is only aggravated where, as here, the agreement that grants recognition also requires the covered employees as a condition of their employment to join and pay dues to a labor organization they have not freely chosen." *John B. Shriver Co.*, 103 NLRB 23, 38; see also *Charles W. Carter Co.*, 145 NLRB 251, 262.

Accordingly, an argument which seeks to avoid the applicability of Section 10(b) in reliance upon the union security provisions of the agreements fails to account for the Board's finding of a violation of Section 8(a(1) and (2) of the Act, based upon recognizing and contracting with the IAM when it did not have a majority regardless of the union security provisions. By the same token, it fails to account for parts 1(1)(B)(c), and 2(a) of the Board's order and the corresponding provisions of the notice (R. 438, 439, 457-459). These require that, until the unions are certified by the Board, the Company shall withdraw and withhold recognition from the unions and cease performing or giving effect to the agreements. This is the standard remedy for assisting a union by recognizing and contracting with it when it does not have a majority. *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453.

In short, the applicability of the limitations provision of Section 10(b) can hardly be explained away by an argument which relies upon the union security provisions of the agreement, when a significant part of the Board's unfair labor practice findings and order do not depend at all upon the union security element.

Finally, the case law, as the dissenting Board members effectively demonstrate in their opinion (R. 452-

457), is in keeping with the distinction between an agreement valid on its face and one invalid on its face. Where an agreement is invalid on its face, as in providing for a closed shop [21] or in investing a union with exclusive power to resolve seniority controversies,[22] no more than proof of the current effectiveness of the agreement is necessary to establish a present violation, as the cases hold.[23] Such cases furnish no authority

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[21] *National Labor Relations Board* v. *United Hoisting Co., Inc.*, 198 F.2d 465, 468-469 (C.A. 3), cert. denied, 344 U.S. 914; *National Labor Relations Board* v. *F. H. McGraw & Co.*, 206 F.2d 635, 639 (C.A. 6).

[22] *National Labor Relations Board* v. *Dallas General Drivers*, 228 F.2d 702, 705 (C.A. 5); *National Labor Relations Board* v. *International Brotherhood of Teamsters*, 225 F.2d 343 (C.A. 8) (wherein no question of limitations pertaining to the contract was in any event raised or considered at all either before the Board or court). We do not acquiesce in the substantive view that conferring exclusive power upon a union to resolve seniority controversies is invalid, but this of course is not material to the question of limitations presented here.

[23] The Board majority also relies upon *Guy F. Atkinson Co.*, 90 NLRB 143, enforcement denied without reaching limitations grounds, 195 F.2d 141 (C.A. 9) (R. 434-435). In that case, however, the agreement contained a closed shop provision, and was therefore invalid on its face. The agreement had been executed under the Wagner Act, but the contracting employer applied it under the Taft-Hartley Act, and to defend performance of it relied upon the saving provision of Section 102 of the amended Act. That section provides in substance that a closed shop agreement entered into under the Wagner Act could be performed under the Taft-Hartley Act, "if the performance of such obligation would not have constituted an unfair labor practice under Section 8(3) of the National Labor Relations Act prior to the effective date of this title . . ." The contracting company could not establish this defense, the Board finding that the work force at the time the contract was signed was not representative of that shortly to be employed. For that reason performance of the contract would "have constituted an unfair labor practice under Section 8(3) of the National Labor Relations Act prior to the

for the view that the statute of limitations does not run from the inception of an agreement valid on its face.

The court below states that it "uphold[s] the Board's order under the authority of *NLRB* v. *Gaynor News Co.*, *supra*, 197 F.2d 719 (2d Cir. 1952), . . . [affirmed upon the grant of a petition for certiorari raising other questions, 347 U.S. 17] and *Katz* v. *NLRB*; *supra*, 196 F.2d 411 (9th Cir. 1952)" (R. 475). But, as the court itself recognized (R. 470-471), the invalidity of the agreements in the cited cases was established by a fact in existence within the six month period; there was no need to look to any event antedating the six-month period to establish the illegal elements.[24] Here, on the contrary, it is an unfair labor

effective date of this title," and therefore Section 102 did not save performance of the contract which was otherwise invalid on its face. In this posture of the case, no limitations issue was or could be raised or considered in a context pertinent to any question presented here.

[24] The cited cases were decided under that part of the proviso to Section 8(a)(3)—since repealed (Public Law 189, 82d Cong., 1st Sess.)—which had required, in order to validate any union security agreement, that "following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement." An agreement valid on its face, but unsupported by the requisite certificate of the contracting union, was illegal, and a complaint could properly issue based upon the maintenance of the agreement in effect although executed more than six months before the filing and service of the charge. However, the violation was established by proof of the existence of the agreement, plus proof of the lack of the certificate (see Rule 44(b), Fed. R. Civ. Proc., made applicable to the Board by Section 10(b) of the Act), both of which were facts in being within the allowable six-month period; there was no need to look to

practice antedating the period which is the exclusive foundation for finding a violation within the period. The court below can hardly invoke the "authority" of cases in which "the present question was not involved. . . ." *Wright* v. *United States*, 302 U.S. 583, 593.

None of the other cases cited by the Board majority in its opinion support its position. On the contrary, as in *Local Union 1418, General Longshore Workers*, 102 NLRB 720, 730, enforced 212 F.2d 846 (C.A. 5), cited at R. 433, n. 12, the Board explicitly stated that, "But, because of Section 10(b), no unfair labor practice finding may be made to rest upon the bare presumption of continuity. More is required, and that in the form of independent proof that within the 10(b) period the Respondent engaged in some affirmative conduct that was itself illegal . . ."; and, as in *Potlatch Forests, Inc.*, 87 NLRB 1193, 1211, enforcement denied without reaching limitations questions, 189 F.2d 82 (C.A. 9), cited at R. 433, n. 11, the alleged discriminatory layoffs "occurred well within the statutory period limited by Section 10(b). The Respondent's earlier conduct [antedating the allowable six-month period] has been considered here merely for the purpose of bringing into clearer focus the conduct in issue [within the period]. Even without such consideration, however, the allegations of discrimination would have been found amply supported by such undisputed record facts as bear directly upon the layoffs. . . ."

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events antedating the period in order to establish the violation. Moreover, in the *Gaynor* case, a charge had actually been filed within three months of the execution of the agreement, and it was in reliance upon this timely filed charge that the Board in its decision had supported the complaint. 93 NLRB 299, 307-309.

Accordingly, neither principle nor precedent supports the Board in its conclusion that the maintenance in effect of an agreement valid on its face can be found to be an unfair labor practice in exclusive reliance upon alleged illegality in its inception antedating the filing and service of the charge by more than six months.[25]

F. The Court Below Erroneously Invokes The Public Character Of The Statute And The Limited Scope Of Judicial Review To Support The Inapplicability Of The Limitations Provision of Section 10(b).

1. *Public Character of the Statute:* The court below states that, because of the more ramified interests with which the Taft-Hartley Act deals, "in interpreting, applying and administering a statute of limitations prescribed by Congress in this context, the Board—and the courts—are not confronted by precisely the same considerations as apply to statutes of limitations affecting the private rights of two individual litigants" (R. 474). This is novel doctrine. This Court was unimpressed with it in *Uncxcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 66. In that case, in holding that a complaint under the Walsh-Healey Act alleging the knowing employment of child labor was barred by limitations, this Court gave the statute of limitations a conventional construction, rejecting the countervailing argument that the conventional construction "will prejudice the power of the

[25] The Board majority argues that, if Section 10(b) operates as a bar, it "would permit an employer and a union to enter into an unlawful arrangement before a plant started operating which they could then enforce with impunity 6 months after executing the agreement" (R. 434). That is not this case, nor is the concern real. It has long been settled that fraudulent concealment or justifiable unawareness tolls the running of a statute of limitations. Note, *Developments In The Law, Statutes Of Limitations*, 63 Harv. L. Rev. 1178, 1217-1219, 1220-1224. Cf., *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231.

United States, to safeguard the public interest." *Id.* at 66. Congress was also unimpressed when it enacted Section 10(b). It described the mischief at which it aimed in the traditional terms of eliminating delayed litigation "after the records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused." H. Rep. No. 245, 80th Cong., 1st Sess., 40, in 1 Leg. Hist. 331. In its earlier enactment of the limitations riders upon the Board's appropriations, designed expressly to safeguard from invalidation union security agreements not the subject of a timely charge, Congress stressed "stabilization", the thought which is fundamental to repose (*supra*, p. 39). And the very shortness of the six-month period which Congress adopted demonstrates its dominating purpose to bring about speedy surcease to a controversy not made the subject of a prompt charge. When the court below states, with approval, that the "Board may have thought that the interests of self determination outweighed otherwise important considerations of burying stale disputes" (R. 475), it sanctions an administrative revision of the congressional judgment.

2. *Scope of Judicial Review:* The court below states that "Our scope of review is limited to determining . . . whether the Board has applied the statute in a 'just and reasoned manner.' *Gray* v. *Powell*, 314 U.S. 402, 414 (1941). Having in mind this limited scope of review, we are constrained to uphold the Board's conclusion" (R. 469).[28] To invoke this concept in

[28] Omitted from the quotation is the court's additional statement that review is also "limited to determining whether there is substantial evidence in the record as a whole to support the Board's findings of fact . . ." (R. 469). This is correct but irrelevant since petitioners did not contest the findings.

this case "is heresy." *Jaffe, Judicial Review: "Substantial Evidence On The Whole Record,"* 64 Harv. L. Rev. 1233, 1258 (1951). *Gray* v. *Powell* teaches that "Once the appropriate standards of relevance have been given by the courts, the agency is the sole body competent to apply those standards to a state of facts, whether agreed to or disputed." *Id.* at 1259. That is not this case. Here it is the meaning of the statute itself which must be determined in the light of its words, purpose, and history; and since it is the meaning of a statute of limitations in particular which is in issue, the subject by its nature is especially suited for independent judicial inquiry. Agency expertness not only does not contribute to the solution of this naked question of law but positively derogates from it. For the drive of the administrative mind is to regard a statute of limitations as an annoying impediment to the accomplishment of the agency's regulatory mission. It takes a mind schooled in a broader discipline to know, as Mr. Justice Holmes has stated, that "the principle [of repose] involved is as worthy of respect as any known to the law." *Dunbar* v. *Providence and Boston R.R. Co.*, 181 Mass. 383, 385. In this context for the court below to say that it is "constrained" to uphold the Board's conclusion as "rational" (R. 470) and "not unreasonable" (R. 473) "suggests an abdication of the judicial function." Jaffe, *Judicial Review: Questions of Law*, 69 Harv. L. Rev. 239, 263 (1955).

II. THE BOARD'S ORDER IS OUTSIDE THE ALLOWABLE SCOPE OF ITS DISCRETION INSOFAR AS IT REQUIRES PETITIONERS TO REIMBURSE THE EMPLOYEES FOR THE UNION DUES AND INITIATION FEES REMITTED BY THE COMPANY TO PETITIONERS PURSUANT TO THE INDIVIDUAL CHECKOFF AUTHORIZATIONS OF EACH EMPLOYEE.

The Board's order, enforced by the court below (R. 478), requires that the union and the Company "shall jointly and severally reimburse the employees and the former employees of the Respondent Company whose initiation fees and or dues in the Respondent Unions have been checked off pursuant to any agreement between the Respondents for the amounts deducted from the employees' earnings, beginning with the applicable 6-month period" (R. 442).

An order cannot stand if it is "not appropriate or adapted to the situation calling for redress and constitutes an abuse of the Board's discretionary power." *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 463. While broad, the Board's "power is not limitless; it is contained by the requirement that the remedy shall be 'appropriate,' *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, and shall 'be adapted to the situation which calls for redress.' *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. The Board may not apply 'a remedy it has worked out on the basis of its experience, without regard to the circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.' *Labor Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349." *Id.* at 458.

We now show that the refund order in this case is not a remedy that is rooted in a reasoned and reasonable expression of judgment. It is based on an in-

supportable premise; it disregards factors relevant to the judgment; and it is responsive to considerations which should be foreign to the judgment.

A. The Refund Order Is Based On The Premise That Payment Of Dues And Fees Must Be Presumed To Be Involuntary Because Of The Union Security Agreement.

The Board gave no explanation for its refund order other than to cite its earlier opinion in *Hibbard Dowel Co*, 143 NLRB 28 (R 417, n. 100, 442, n. 23).[27] In that opinion the Board stated (113 NLRB at 30-31):

> . . . the remedy of reimbursement of checked off dues is appropriate and necessary to expunge the illegal effects of the Respondents' unfair labor practices. . . . [T]he Respondent Company has given unlawful assistance and support to the Respondent Union which it has foisted on the employees as their bargaining representative in disregard of their statutory rights. Moreover, by their union-security agreement, implemented by a dues checkoff arrangement, the Respondents have unlawfully required the employees to maintain membership in the Respondent Union as the price of employment and thereby to support an organization not of their own choosing. In these circumstances, we find that it will effectuate the policies of the Act to order the Respondents jointly and severally to refund to the employees all dues deducted by the Respondent Company pursuant to checkoff authorizations for the benefit of Respondent Union.

Stripped to its essence the Board justifies the refund of checked-off dues and initiation fees solely because of the sanction of the underlying union security agree-

[27] The Board also cited *Charles W. Carter Co.*, 115 NLRB 251, but *Carter* did nothing more than to cite *Hibbard Dowel* also, 115 NLRB 263.

ment which it found to be invalid. The statement that the union was "foisted" on the employees is irrelevant because severance is effectively accomplished by other provisions of the order. Reimbursement is not necessary to "unfoisting." And the sanction of the union security agreement is relevant only upon the assumption that but for it dues and fees would not have been paid. At the heart of the Board's rationale, therefore, is the premise that dues and fees were involuntarily paid, and that since the involuntarism was rooted in an invalid agreement reimbursement is justified.

B. The Premise Is False That Payment Of Dues And Fees Is Involuntary Because Of A Union Security Agreement.

The premise that payment of dues and fees is involuntary, resulting solely from the sanction of a union security agreement, is fundamentally false. When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement could only be valid "if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . ." This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong., 1st Sess.), it having proved "burdensome and unnecessary." *National Labor Relations Board* v. *Gaynor News Co.*, 197 F.2d 719, 724 (C.A. 2), affirmed, 347 U.S. 17. Its pointlessness was manifest from the results of the union-shop authorization polls conducted by the Board. "During the 4 years and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board con-

ducted 46,119 such polls. Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97 percent of those conducted."[28] For the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop.[29] The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the union shop;[30] in 1949, of 1,471,092 valid votes, 93.9% favored the union shop;[31] in 1948, of 1,629,330 valid votes, 94.2% favored the union shop.[32]

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements forever put the quietus to the notion that such agreements merely constitute a device to constrain the payment of dues and fees by an unwilling majority. These agreements operate compulsively only as to that small group known as "'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union. . . ." *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 41. Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation to pay.

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[28] N. L. R. B., Sixteenth Annual Report, p. 10 (1951).

[29] *Id.* at 306 (1951).

[30] N. L. R. B., Fifteenth Annual Report, p. 235 (1950).

[31] N. L. R. B., Fourteenth Annual Report, p. 172 (1949).

[32] N. L. R. B., Thirteenth Annual Report, p. 111 (1948).

There is no reason to suppose that the sentiment was different in the present case for the period to which the refund order is applicable. While the 1951 amendment repealed the requirement of a prior election to validate a union security agreement, it substituted in its stead the stipulation that a union security agreement may neither be executed nor enforced if "following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement." (Section 8(a)(3) proviso.) Thus the employees have it within their power to divest an agreement of its union security provision. No deauthorization petition was ever filed in this case, although it could have been at any time (*Andor Co., Inc.*, 119 NLRB 925), the only requirement for the conduct of an election being that the petition be supported "by 30 per centum of the employees in a bargaining unit covered by an agreement" containing a union security clause (Sec. 9(e)(1)). Not even 30 percent of the employees could be mustered to support an election looking toward rescission of the union security provision of the agreements.

This record demonstrates the extremes of the Board's assumption. The Board premises the invalidity of the union security agreement upon the single circumstance that less than half of 148 employees designated the IAM to represent them on August 10, 1954. Yet there were 350 employees in the unit about a year later, more than doubling the initial complement; and there were 480 employees in the unit on

November 21, 1955, more than tripling the initial complement (*supra*, pp. 7-8). Thus most of the employees were newly added after the original execution of the 1954 agreement. When they arrived on the scene they found nothing but the conventional manifestations of a typical bargaining relationship. There is no reason to suppose that they did not willingly embrace what they found, as is true in thousands of plants throughout the United States.

Nor can the Board appropriately invoke the concept that, since the IAM did not have majority support at the time of its acquisition of status as the representative, the future favor it gained among the employees bore the influence of the original taint and could not therefore be said to be altogether untrammelled.[33] This concept is appropriately confined to the situations to which it has been applied, namely, to support relief of an injunctive character.[34] An order requiring that an employer cease giving future effect to an agreement with an assisted union, withhold recognition until the union's majority status has been established by an election, and post notices of desistance from unfair labor practices simply wipes the slate clean. It sets the stage for a fresh start.

But it stretches the concept too thin to invoke it to support the refund of dues and fees. It is a far

[33] See *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 79, 81-82.

[34] It is noteworthy that in the case cited in the preceding note, although the employer entered into a closed shop agreement with a union which had no majority and which the employer actively assisted by unfair labor practices including discriminatory discharges, the order entered by the Board did not require the refund of fees and dues. *Serrick Corp.*, 8 NLRB 621, 652-655.

ery from a desistance order to a refund order, and the circumstance appropriate for injunctive relief are by no means necessarily adequate to justify a monetary recovery. The only justification for a refund order is to make an employee whole for that which was extracted from him. "Since only actual losses should be made good" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198), solid proof of exaction is indispensable. To return a voluntary payment is not to make the employee whole but to make him the beneficiary of a windfall. And so the law has long established the rule that damages are not recoverable unless they are "the certain result of the wrong," "definitely attributable to the wrong. . . ." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562: "Certainty in the fact of damage is essential." *Palmer* v. *Connecticut R. & L. Co.*, 311 U.S. 544, 561. See also, *Talon, Inc.* v. *Union Slide Fastener, Inc.*, 266 F.2d 731, 736-737 (C.A. 9). Accordingly, however appropriate it is to justify a cease-and-desist order as desirable to dispel whatever lingering effect of an unfair labor practice there may be, it will not do as justification for what is in essence an award of compensatory damages. No one "may properly seek to secure something from another without . . . demonstrating pecuniary loss springing from or consequent upon the unlawful act." *Beegle* v. *Thompson*, 138 F.2d 875, 881 (A. 7), cert. denied, 322 U.S. 73. To refund dues and fees to an employee, for which he has received services, without a solid showing that he involuntarily paid them, is not to make him whole but to unjustly enrich him.[35]

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[35] Nor will it do for the Board to say that we are invoking a rule of damages relevant to private injury but not germane to the public character of the rights created by the Act. The rule

In this case, there is no substantial warrant for the Board's assumption that the fees and dues were involuntarily paid. The mere existence of a union security agreement does not make them so, as experience has conclusively shown; and the employees here did not even attempt to invoke the available statutory opportunity to divest the agreement of its union security clause. And the speculative character of any actual constraint is especially apparent in view of the doubling and tripling of the initial complement of employees (*supra*, pp. 7-8), the expansion from one to two plants (*supra*, p. 6), the quick settling of the situation into a conventional bargaining relationship, and the probable and usual turnover of employees. There is in the circumstances no fair basis for the Board's adjudication of pecuniary liability on a mass basis.

C. The Refund Order Disregards The Services Received By The Employees; Requires One Group Of Employees To Pay For The Benefits Received By Another Group Of Employees; And Requires The Company To Return Moneys It Never Kept.

The emptiness of the Board's major premise is matched by its disregard of other cogent considerations. Employees voluntarily pay dues and fees because they know they cannot have the benefits of union representation without contributing to their cost. In this case, the employees received benefits, and it can hardly be doubted that costs were incurred.

The 1954 and 1955 agreements provided substantial benefits for the employees. The most dramatic mani-

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has its most frequent application in antitrust litigation, and one would be hard put to say whether the antitrust laws or the National Labor Relations Act have a more distinctively public character. See *Radovich* v. *National Football League*, 352 U.S. 445, 453-454 and n. 10; *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F.2d 636, 644 (C.A. 5).

festation was the ten cents per hour wage increase obtained during the term of the 1954 agreement, and the 31 cents per hour during the term of the 1955 agreement (*supra*, pp. 5, 7). The wage increases did not exhaust the benefits conferred. No less important, if perhaps less tangible, are provisions like those regulating reporting and call-in time, the perquisites of seniority, protection against improper discharge (which exists only by virtue of agreement), and numerous other matters essential to an ordered and decent industrial way of life. Finally, and not the least of the benefits, is a procedure for grievance adjustment culminating in arbitration for handling grievances.

The negotiation and administration of an agreement costs money. Effective representation requires a full-time paid staff, at the international level at least if not also at the local level. Preparing and presenting a case in arbitration is not inexpensive; and arbitrators must be paid.

Dues and fees go towards defraying the cost. They do not repose in depositories accumulating compound interest. And they did not in this case. They paid for services. While the record does not show one way or another, it may safely be assumed that much of the moneys have been expended. To require the refund of dues and fees at this late date does not simply mean that the employees will have received the benefits of union representation without contributing to their cost. The moneys for reimbursement must come from somewhere; and insofar as the unions are concerned, they must come from the dues and fees paid by other employees in other plants. What reimbursement comes down to, therefore, is that the employees in this case will have the benefits they secured from union

representation paid for by the employees in other plants. We find it difficult to believe that this serves to effectuate any policy of the Act.

Furthermore, the refund of dues and fees not only disregards the cost of past services, it impairs the capacity of the union to render future services. To drain a union's treasury is, to the extent of the drain, to disable it from functioning as effectively in negotiating and administering future agreements. Should a strike be necessary to consummate a satisfactory settlement, the wherewithal to pay strike benefits and defray other costs may have been destroyed or prejudicially curtailed. In addition, aside from the negotiation and administration of an agreement, unions undertake to provide for their members many valuable benefits which are intraunion in character. Death or disability plans, mutual insurance, medical care, institutions for the aged and the infirm, and vacation facilities are among these.[38] To drain the union's treasury by requiring the refund of dues and fees may seriously jeopardize its ability to meet existing commitments and prudently to undertake additional benefit programs. This too does not serve to effectuate any policy of the Act.

As for the Company, upon which joint and several liability to refund the dues and fees is imposed, it simply acted as a conduit for the transmission of the funds. It deducted the moneys from the pay of the employees pursuant to their individual check-off authorizations. It never kept the moneys. It transmitted them to unions which were, as the Board found, neither sponsored nor dominated by the Company (R.

[38] See Barbash, The Practice of Unionism, 300-304 (1956).

413-414). To fix liability upon the Company is not to remedy the wrong but to punish the Company for its commisson.

D. The Order Requires The Refund Of Checked-Off Dues and Fees Although The Check-Off Was Individually Authorized.

The lack of substantial warrant for the Board's order is also shown by the fact that it is only the fees and dues checked-off pursuant to the employee's individual authorization which is to be refunded. But if there is any merit to the Board's position, the fees and dues paid directly to the union, as well as those remitted by the employer pursuant to the check-off authorization, should be refunded. For if it is the sanction of the union security agreement which is important, that sanction exerts its influence in the one case as effectively as in the other. But if, as we must infer from the Board's order, it is the check-off authorization which is critical, it is plain that that authorization is the individual voluntary act of each employee. Nothing compels the check-off authorization; it serves the employee's convenience as well as the union's. In fact, Section 302(c)(4), Title III, Labor-Management Relations Act, 1947, expressly sanctions check-off upon the individual authorization of the employee. It permits "money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner. . . ."

Thus in requiring the refund of *checked-off* fees and dues, the Board's order identifies as critical the very act which indisputably flows from the employee's individual authorization. Moreover, it seriously affects the acceptability of a check-off arrangement to the employer and hence its utility to unions and employees. For the Board's order "might have a deterrent effect generally in respect to the check-off practice, since employers surely would hesitate to engage in the check-off practice for the benefit of organized labor groups if there should remain the possibility that the employer might find itself compelled to reimburse employees for sums which the employees have authorized the employer to check-off." *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F.2d 984, 988 (C.A. 7).[37]

E. Virginia Electric And Power Company v. National Labor Relations Board Is Not Authority For The Board's Position: The Current Version Of The Refund Order Is An Unreasoned Extension And Misapplication Of Virginia Electric And Has A Plainly Punitive Purpose.

1. Virginia Electric And Power Company v. National Labor Relations Board.

The Board relies upon this Court's decision in *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U.S. 533. All this Court decided was that a refund order was within the Board's power and that the exercise of the power was within the Board's discretion in the particular circumstances of

[37] While this case was decided before this Court's decision in *Virginia Electric and Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, we show hereafter that *Virginia Electric* did not impair the authority of the preceding cases in their application to circumstances different from those presented in *Virginia Electric* (*infra*, p. 84).

that case. But the circumstances of *Virginia Electric* are so different from those in this case as to furnish no fair support for the result reached here. Thus the ruling circumstance in *Virginia Electric*, which controlled the evaluation of every other factor, was "that the Company was responsible for the creation of the I. O. E. [the contracting union] by providing its initial impetus and direction and by contributing support during its critical formative period." 319 U.S. at 540. The company-dominated character of the contracting union is at the heart of *Virginia Electric*.[38] Even as to company-dominated unions the Court declined to lay down a blanket rule. Referring to eleven preceding decisions of five Courts of Appeals, which had declined to approve refund orders, the Court stated "We need not now examine the various situations that were before the Circuit Court of Appeals in the cases collected in Note 1, *ante*, or consider hypothetical possibilities. We decide only the case before us and sustain the power of the Board to order reimbursement in full under the circumstances here disclosed." 319 U.S. at 545.[39]

Plainly the Court has laid down no blanket rule relieving the Board of its task of exercising a reasoned judgment. The ruling factor of domination present in *Virginia Electric* is absent here. In this case the Board expressly found that the unions were

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[38] See, *National Labor Relations Board* v. *McGough Bakeries Corp.*, 153 F.2d 420, 425 (C.A. 5); cf. *National Labor Relations Board* v. *Clinchfield Coal Corp.*, 145 F.2d 66, 73 (C.A. 4).

[39] Of the preceding cases, the most cogently reasoned are *Western Union Tel. Co.* v. *National Labor Relations Board*, 113 F.2d 992, 997-998 (C.A. 2), and *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F.2d 984, 988-989 (C.A. 7).

not sponsored or dominated by the Company (R. 413-414). It cannot be said here, as it was in *Virginia Electric*, that the union is the employer's "creature" (319 U.S. at 540), that the employer imposed upon the employees "the cost of maintaining an organization which he has dominated" (*id.* at 541), that the union had "an employer-dominated beginning" and the employer "seized upon" the union shop and check-off "to establish the . . . [union] firmly" (*id.* at 543), that the union is "a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest" (*id.* at 544),[40] and that the moneys went "into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage" (*ibid.*). These are not the circumstances in this case and there are no substituting circumstances which the Board has convincingly appraised or which exist to support the refund order here.

2. The extension and misapplication of Virginia Electric.

After *Virginia Electric*, until recently, the Board's application of the refund remedy seems to have been sparing and circumspect. The Board utilized the order in cases of active and widespread support of a union by an employer which, although short of domination, was so serious as effectively to impair the union's independence. *E.g., National Labor Relations Board* v. *Parker Brothers*, 209 F.2d 278 (C.A.

[40] The IAM is composed of 2,076 local unions with a membership of 949,683. Directory of National and International Labor Unions in the United States, 1957, Bull. No. 1222, U.S. Dep't. of Lab., Bur. Lab. Stat., 37 (1957).

5). Short of domination or its virtual equivalent, the Board entered a refund order in favor of specific employees found in their individual situations to have been coerced into paying fees and dues. *E.g., National Labor Relations Board* v. *Local 404*, 205 F.2d 99 (C.A. 1), enforcing 100 NLRB 801.[41] The judicial attitude was not receptive to blanketing generality. "The validity of reimbursement orders necessarily depends upon the peculiar circumstances of each case." *National Labor Relations Board* v. *Adhesive Products Corp.*, 258 F.2d 403, 409 (C.A. 2). Refund orders were not upheld where based on generalizations which failed realistically to reflect the actual situation. *National Labor Relations Board* v. *McGough Bakeries Corp.*, 153 F.2d 420, 425 (C.A. 5); *National Labor Relations Board* v. *Shedd-Brown Mfg. Co.*, 213 F.2d 163, 170-171 (C.A. 7); *National Labor Relations Board* v. *Braswell Motor Freight Lines*, 213 F.2d 208 (C.A. 5).

The Board's sharp break with the past appears to have begun with *Hibbard Dowel Co.*, 113 NLRB 28. There the Board seems to have founded a refund order solely on the contracting union's lack of majority

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[41] The refund order in *Local 404* ran in favor of 31 identified employees (205 F.2d at 102, 103; 100 NLRB 801, 803, 804-805). The union shop agreement in that case was invalidly applied to a unit of 65 employees (205 F.2d at 101; 100 NLRB at 806, 809). The refund order ran, not to all 65 employees, but only to 31 of them. Hence, compulsory membership pursuant to the union shop provision of the agreement was not the basis for the order. Instead, the explicit foundation for the order in favor of the 31 employees was that these particular employees joined "under protest" as the result of the coercion of "join up or else" threats and a sit-down strike (205 F.2d at 101, 102, n. 2; 100 NLRB at 809, 811, 812).

status at the time of its original entry into the union security agreement.

The Board took its next step in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594. There the representative status of the contracting union was undisputed, but the agreement it entered into provided for a closed shop, a form of union security in excess of the maximum permissible under the Act. The Board founded the refund order upon the closed shop feature of the agreement and disregarded the untrammelled character of the union's majority status. The Board's current version of the refund order has come to be known as the *Brown-Olds* remedy, the name being derived from this case.

The Board took a further step in *Los-Angeles-Seattle Motor Express, Inc.*, 121 NLRB No. 205, 43 LRRM 1029, 1030, review pending and argument heard, C. A. D. C. No. 14, 794. The agreement in that case established a nondiscriminatory hiring hall and provided that the contracting employers were to hire casual employees solely through that hall. The majority status of the contracting union was undisputed, the union shop provision was completely legal, and that provision was in any event inapplicable to the casual employees in whose favor the refund order ran. The Board nevertheless entered a refund order and founded it upon the noninclusion in the agreement of three requirements that the Board had devised in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 897, remanded, 44 LRRM 2802 (C.A. 9):[42]

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[42] The Court of Appeals for the Ninth Circuit stated in part that (44 LRRM at 2805): "The Board does decide that a hiring hall contract absent certain guaranties violated the Act. But,

> . . . we would find . . . [a hiring hall] agreement to be nondiscriminatory on its face, only if the agreement explicitly provided that:
>
> (1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
>
> (2) The employer retains the right to reject any job applicant referred by the union.
>
> (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

The drastic reformulation of the circumstances thought appropriate for a refund order is thus evident. As the General Counsel of the Board [43] has explained, what the Board has done "was to extend the broad reimbursement order, theretofore reserved for Section 8(a)(2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM 101.

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upon the principles controlling the precedents above cited, the ruling cannot be upheld. An agreement that the hiring of employees be done through particular union offices does not violate the Act 'absent evidence that the Union unlawfully discriminated in supplying the company with personnel.'"

[43] All references in this brief to the General Counsel are to Jerome D. Fenton and to statements made by him during his term of office from March 4, 1957 to June 26, 1959.

102. The innovation in this case was to found the refund order solely upon the union security provision of the agreement and to have it run in favor of all the employees covered by the agreement at any time. In protesting this innovation, former Board member Peterson has stated in dissent that (*Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 605-606):

> . . . that the contract constitutes an unlawful closed-shop agreement . . . [does not show] that the dues and assessments were coercively collected. As the cases cited by the majority show, the illegality of an assessment provision and the unlawful character of a dues requirement in a closed shop contract do not alone support a reimbursement remedy. These cases differ from the pre-Taft-Hartley cases involving Section 8(a)(2) of the Act in that the dominated-union cases involved checkoff by employers in favor of unions which were in effect instrumentalities of such employers. Thus, although collection of dues may be deemed in a sense tainted with illegality where there is a closed-shop contract, the Board has in such situations, unlike Section 8(a)(2) cases, insisted upon specific evidence of coercion or threats by the union aside from the import of the contract itself.

The mechanical character of the Board's current application of the refund order is evident from its very recent statement that "the existence of an unlawful [closed shop or hiring hall] contract is sufficient in and of itself to establish the element of coercion in the payment of monies by employees pursuant to the requirements of such a contract . . . whether or not proof of actual exaction of payment is established." *Local 138, International Union of Operating Engineers*, 123 NLRB No. 167, 44 LRRM 1138, 1139.

As we now show, the current version of the refund order has been deliberately devised to accomplish a punitive purpose, not a remedial objective.

3. The punitive purpose of the current version of the refund order.

It is demonstrable that the Board's present use of the refund order is part of an overall plan to coerce employers and unions into yielding to the Board's conception of a valid union security or hiring agreement and to penalize them for failing to acquiesce in the Board's command. The attribute of the order which lends it to punitive application is the staggering financial liability it entails. This can be quickly illustrated. Assume a local union with a membership of two thousand all covered by one agreement. Assume further a monthly dues rate of four dollars, giving the local a monthly income from dues of eight thousand dollars. A contested proceeding before the Board, from the filing of the charge through the enforcement of the order by a Court of Appeals, usually takes about three years. Since the liability to refund the dues begins to run from the date six months preceding the filing of the charge, an enforced refund order against a local union of two thousand members paying four dollars per month would require the repayment of 280,000 dollars. Nor does this take into account initiation fees received during the period.[44] And the liability is fantastically multiplied if the union is a party to a multi-employer contract. As the Board has said (*Local 138, International*

[44] In this case, although the unit of employees is a small one ranging in number from a low of 148 employees to a high of 480 employees (*supra*, pp. 7-8), the liability as of August 29, 1958, more than a year ago, was estimated at about $45,000.

Union of Operating Engineers, 123 NLRB No. 167, 44 LRRM 1138, 1139):

> In cases involving multi-employer contracts in which the contracting union and one or more employers are named respondent parties to the contract, the Union's liability for reimbursement of sums unlawfully exacted also shall extend to all employees covered under such contract found unlawful; each named employer respondent shall be liable jointly and severally with the Union for the reimbursement of sums paid by its own employees. Although a collective bargaining contract may extend to employees of more than one employer, the limitation upon the liability of a particular employer derives from the fact that an employer participates in a contract only to the extent its own employees are involved. On the other hand, a Union which maintains contractual relations with one or more employers participates to the full extent of the contract's coverage. Accordingly, it would seem reasonable and logical that a Union's liability for reimbursement extend to all employees of all employers unlawfully coerced by the Union's contract into paying monies to the Union.

It is therefore apparent that a union and an employer can resist yielding to the Board's conception of a valid agreement only at the risk of staggering financial loss should the Board prevail. This is the lever which the Board has deliberately exploited to coerce compliance with its version of a valid agreement. Thus, on February 7, 1958, the General Counsel of the Board wrote to the Building and Construction Trades Department, AFL-CIO, Associated General Contractors, and National Contractors Association, advising them "to correct" their hiring arrangements within three months under pain of ap-

plication of the *Brown-Olds* refund order if they did not (5 CCH Lab. Law Rep. ¶ 50,060):

> As you know, the Board, commencing with the *Brown-Olds* case, 115 NLRB 594, has held that where illegal hiring arrangements exist, either pursuant to a contract or practice, the appropriate remedy, in addition to the usual remedial provisions, requires the reimbursement of all monies, including initiation fees, dues, permit fees, assessments, "dobies," and the like, collected pursuant to such arrangements. The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements.
>
> It would be preferable, of course, if the parties took it upon themselves to correct their illegal hiring arrangements, thereby achieving the same basic purpose sought by the Board but without the necessity of Board action. Such overall elimination of illegal hiring arrangements, by voluntary action, would not only help effectuate the purposes of the Act, but would clearly be an important step in the general public interest and in the furtherance of the fundamental rights of employees.
>
> With this thought in mind, I would like to suggest that during a period of three months, commencing March 1, 1958, employers and unions, who are party to illegal hiring arrangements, vigorously undertake to correct such arrangements by bringing them into compliance with the provisions of the Labor Management Relations Act of 1947. If this is done, it may warrant the disposition, without full application of the *Brown-Olds* reimbursement remedy, of charges based upon illegal hiring arrangements which have been voluntarily conformed to the provi-

sions of the Act during the period prior to June 1, 1958. It will also warrant my recommending to the Board during such period a similar disposition of all cases currently pending or brought before the Board with respect to such illegal hiring arrangements. It is understood, however, that apart from the non-application of the *Brown-Olds* reimbursement remedy, all charges and cases relating to or arising out of illegal hiring arrangements must be processed in normal fashion although such arrangements may have been corrected during the period prior to June 1, 1958.

The Office of the General Counsel will be pleased to cooperate with employers and unions in this matter.

Thereafter, on April 1, 1958, the Board issued its decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, remanded 44 LRRM 2802 (C.A. 9), in which it formulated the three requirements for inclusion in agreements established hiring halls (*supra*, pp 87-88). Significantly, the order in *Mountain Pacific* did *not* require the refund of dues and fees, thus showing that as of a year and one-half ago at this writing the Board did not deem reimbursement essential to an effective remedy in this situation. Nevertheless, on April 23, 1958, three weeks after *Mountain Pacific* had issued, the General Counsel wrote another letter, this time to the Associated General Contractors, National Contractors Association, and National Electric Contractors Association, extending the moratorium for application of the *Brown-Olds* remedy from June 1, 1958 to September 4, 1958, and adverting to the establishment in *Mountain Pacific* of "certain legal require-

ments for exclusive hiring arrangements" (5 CCH Lab. Law Rep. ¶ 50,074):

> On February 7, 1958, this Agency announced that during the period March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act, 1947.
>
> Since then we have been advised that a number of unions and employers are vigorously undertaking to bring their union-security and hiring arrangements into conformity with the Act. We have been further advised that unions and employers are also reviewing such arrangements in light of the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.* (119 NLRB No. 126-A, released April 1, 1958), which established certain legal requirements for exclusive hiring arrangements.
>
> In view of these circumstances, a further extension of time beyond June 1, 1958, is warranted so that the parties may have sufficient opportunity to complete their negotiations in an orderly and informed manner. We have therefore extended to September 1, 1958, the period during which this Agency will withhold full application of the *Brown-Olds* reimbursement remedy where the parties voluntarily and diligently correct their union-security and hiring arrangements.

Thereafter, on August 19, 1958, the General Counsel wrote to the Building Trades Employers and Unions advising that, while there would be no general extension of the moratorium beyond September 1, 1958, the *Brown-Olds* remedy might be withheld if

compliance were achieved by November 1, 1958, by those employers and unions currently engaged in "genuine efforts" in that direction (5 CCH Lab. Law Rep. ¶ 50,104):

> On February 7, 1958, this Agency announced that during the period from March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act of 1947, as amended. On April 23, 1958, the period during which this announced policy would apply was extended to September 1, 1958. This extension was based, in part, on the vigorous undertaking by a large number of unions and employers to comply with the above policy and on the desire to provide the parties with a sufficient opportunity to review their agreements in light of the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, (119 NLRB No. 126-A, released April 1, 1958, which established certain legal requirements for exclusive hiring arrangements), and to complete their negotiations in an orderly and informed manner.
>
> In supplementation of the foregoing and, in accord with our announced desire to cooperate with and to assist the parties in whatever way possible in this matter, the Office of the General Counsel recently issued a statement with regard to union hiring halls and referral systems in which comment was made on various questions which had been raised by unions, employers and other interested parties as to the scope and implications of the Board's *Mountain Pacific* decision.
>
> Since the issuance of that statement we have received numerous communications which demon-

strate that many employers and unions are still in the process of renegotiating their agreements in an attempt voluntarily to conform such agreements with the Act but, that due to unavoidable delays inherent in such negotiations, and the complex problems involved, appropriate new agreements, in many instances, will not be executed by September 1,

Under all the circumstances, we have determined that no general extension of the policy of withholding the full application of the *Brown-Olds* remedy beyond September 1 is warranted. However, where the parties have initiated steps and have made genuine efforts to correct their union security and hiring arrangements prior to the September 1 deadline, the full application of the remedy may be withheld provided that conformity with the Act is achieved by November 1, 1958.

You may be assured of our continued cooperation with your efforts to conform your union security and hiring arrangements to the requirements of the Act.

Then, on October 31, 1958, one day before the expiration of the November 1 deadline, the Board entered its refund order in *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB No. 205, 43 LRRM 1029, 1030, review pending and argument heard, C. A. D. C. No. 14,794, the first time that such an order had been based upon the invalidation of a hiring hall agreement because of the omission of the three requirements from it (*supra*, pp. 87-88). The Board thus gave point to its General Counsel's threat that, if compliance were not effectuated during the moratorium, the penalty would be imposition of the *Brown-Olds* remedy. As the General Counsel stated in an address at the 1959 Southeast Trade Exposition on March 21, 1959, "It was not

until the eve of the November 1 deadline that the Board, in the *Los Angeles-Seattle Motors* case, linked *Mountain Pacific* to the *Brown-Olds rationale*" (mimeo. copy, p. 6). He stated in the same address that "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their collective agreements and hiring practices to the requirements of *Mountain Pacific*. In this respect, the major spur has been the so-called *Brown-Olds* remedy . . ." (*id.* at p. 5). The spur was identified as "imposing a liability which may involve substantial sums of money" (*id.* at p. 7), and, he stated, "deterrence is the underlying consideration" (*id.* at p. 8). He described the moratorium as the period of "reprieve" (*id.* at p. 6).

This theme has been emphasized by the General Counsel in repeated speeches. In an address to the Building Industry Employees of New York State on June 27, 1958, he stated: "The purpose of the Board in fashioning the *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by prevailing upon employers and unions to correct their illegal union-security arrangements" (42 LRRM 101, 103). In an address to the Illinois State Bar Association on November 7, 1958, he referred to the *Brown-Olds* remedy as "the first time employers and unions were to be held liable in a monetary sense for illegal union security or hiring arrangements. This liability potentially involves substantial sums of money . . ." (mimeo. copy, p. 4).

But the frankest avowal of the coercive and punitive character of the *Brown-Olds* remedy was given by the

General Counsel in an address to the Rutgers University Conference on September 30, 1958. He stated that the "use that has been made of this extraordinary remedy . . . demonstrates vividly the capabilities of administrative pressure and persuasion . . ." (mimeo. copy, p. 6). He observed that "if employers and unions are to avoid serious consequences, these illegal arrangements must be eliminated. Liability potentially involves substantial sums of money . . ." (*id.* at p. 7). He stated that, as the parties became aware of the "serious monetary risk" they ran, they undertook to conform their agreements to the Board's requirement, and during this time "over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full" (*ibid*). He concluded that, in withholding the refund remedy during the period of the moratorium and threatening to impose it thereafter, "we paid heed to the homely adage of one of our very own citizens, who practiced what he preached at the turn of this twentieth century. I refer to President 'Teddy' Roosevelt. He carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword,' and the results to date have been heartening" (*id.* at p. 8).

These sentiments were echoed by Board Member John H. Fanning who, in referring to the current application of the refund order, stated that the Board "put teeth into the law . . ."[45] He later referred to it as the "stinger."[46] Board Member Joseph A. Jenkins

[45] Address to the American Society for Personnel Administration at Jacksonville, Florida, February 6, 1959, p. 8.

[46] Address, Union Shops and Hiring Halls, The Third Yale Law School Alumni Day, April 25, 1959, p. 15.

reported that the Board "decided that the law must be observed and a remedy provided which would cause compliance therewith. * * * [It] thereafter applied to unions and companies the *Brown-Olds* reimbursement remedy, in order to interest companies and unions in the problem of observing the law."[47] And he later repeated that:[48]

> . . . in order that the construction industry and the unions affected thereby would pay some attention to what the Labor Board was saying we devised what is known as the *Brown-Olds* remedy.
>
> The theory behind the *Brown-Olds* remedy is that we'll indicate to people that in the event they do not comply with the laws enunciated by Congress, we will require the refund of dues and assessments illegally exacted.

It is patent that the Board is exercising punitive power, although its "power to command affirmative action is remedial, not punitive." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 236. It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 10. And when the General Counsel states, as he does, that "deterrence is the underlying consideration" (*supra*, p. 97), it suffices to say, with this Court, that "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too

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[47] Address to the Contracting Plasterers and Lathers International Association, Washington, D. C., June 3, 1959, 44 LRR 135, 136.

[48] Address to the Building Industry Employers of New York State, Lake Placid, New York, June 27, 1959, p. 9.

much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 12. The Board has not only failed to take "fair account . . . of every socially desirable factor in the final judgment" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198), it has in fact entered the refund order in reliance upon factors which should be alien to the judgment.

CONCLUSION

For the reasons stated, the judgment should be reversed and the case remanded to the Court of Appeals with directions to set aside the Board's order.

Respectfully submitted.

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September 1959.

APPENDIX A

The evolution of the limitations rider of the 1948 NLRB Appropriation Act is as follows:

1. On March 21, 1947, The House Appropriations Committee reported H.R. 2700 (H. Rep. No. 178, 80th Cong., 1st Sess.), which reads in pertinent part as follows:

UNION CALENDAR No. 76
80th Congress, 1st Session
H. R. 2700
[Report No. 178]

IN THE HOUSE OF REPRESENTATIVES

March 21, 1947

MR. KEEFE, from the Committee on Appropriations, reported the following bill; which was committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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A BILL

Making appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies, for the fiscal year ending June 30, 1948, and for other purposes.

* * * * *

TITLE III—NATIONAL LABOR RELATIONS BOARD

* * *

No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof *between management and labor* which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: *Provided*, That here-

after, notice of such agreement or a renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: *Provided further*, That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code: • • • [Emphasis supplied.]

This title may be cited as the "National Labor Relations Board Appropriation Act, 1948".

2. On March 26, 1947, five days later, with the limitations rider on the NLRB appropriations identical to the foregoing, H.R. 2700 was twice read and referred to the Senate Appropriations Committee:

H. R. 2700
80th Congress, 1st Session

IN THE SENATE OF THE UNITED STATES
March 26 (legislative day, March 24) 1947
Read twice and referred to the Committee on Appropriations

AN ACT

Making appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies, for the fiscal year ending June 30, 1948, and for other purposes.

• • •

TITLE III—NATIONAL LABOR RELATIONS BOARD

• • •

No part of the funds appropriated in this title shall be used in any way in connection with a complaint case

arising over an agreement, or a renewal thereof, *between management and labor*, which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: *Provided*, That, hereafter, notice of such agreement or a renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: *Provided further*, That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code; * * * [Emphasis supplied.]

* * *

This title may be cited as the "National Labor Relations Board Appropriation Act, 1948."

3. On April 17, 1947, 22 days later, the Senate Labor Committee, in its report accompanying S. 1126, explained, concerning the proposed six-month limitations amendment to Section 10(b) of the National Labor Relations Act, that (S. Rep. No. 105, 80th Cong., 1st Sess., 26):

Section 10(b): The principal substantive change in this section is a provision for a 6-month period of limitations upon the filing of charges. The Board itself by adopting a doctrine of laches has to some extent discouraged dilatory filing of charges, and a rider to the *current appropriations bill* (which if this amendment was adopted would no longer be necessary) contains a 3-month period of limitations with respect to certain kinds of unfair labor practices. [Emphasis supplied.]

4. On April 28, 1947, 11 days later, the Senate Appropriations Committee reported H. R. 2700, and it was then for the first time that the limitations rider on the NLRB appropriations was changed by striking the words "management and labor" and substituting the words "an employer and a labor organization which represents a ma-

jority of his employees in their appropriate bargaining unit" (S. Rep. No. 146, 80th Cong., 1st Sess., 13):

CALENDAR No. 147
80th Congress, 1st Session
H. R. 2700
[Report No. 146]

IN THE SENATE OF THE UNITED STATES

March 26 (legislative day, March 24), 1947

Read twice and referred to the Committee on Appropriations

April 28 (legislative day, April 21), 1947

Reported by Mr. Knowland, with Amendments

[Omit the part struck through and insert the part printed in italic]

AN ACT

Making Appropriations for the Department of Labor, the Federal Security Agency, and related independent agencies, for the fiscal year ending June 30, 1948, and for other purposes.

* * * *

TITLE III—NATIONAL LABOR RELATIONS BOARD

* * *

No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof, between *an employer and a labor organization which represents a majority of his employees in their appropriate bargaining unit*, which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: *Provided*, That, hereafter, notice of such agreement or a renewal thereof shall have been posted in the plant affected for said period of three

months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: *Provided further*, That these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code: * * * [Striking and emphasis in original.]

* * *

This title may be cited as the "National Labor Relations Board Appropriation Act, 1948".

5. On May 5, 1947, seven days later, the House ordered H. R. 2700 to be printed, including the foregoing Senate change in the limitations rider on the NLRB appropriations.

6. The NLRB Appropriation Act, 1948, was passed on July 28, 1957, 35 days *after* the Taft-Hartley amendments were enacted on June 23, 1947, but 25 days before they became effective on August 22, 1947, and included the foregoing change.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), are as follows:

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * *

SEC. (8) (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *.

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:*[1] *Provided fur-*

[1] The matter in brackets was repealed, and the matter in italics was added, by Public Law 189, 82d Cong., 1st Sess., October 22, 1951.

ther. That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *.

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *.

* * * * *

[Sec. 9] (c) [(1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organiza-

tion made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.]

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.[2]

* * * * *

[Sec. 10] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

* * * * *

[Sec. 10 (c)] * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is

[2] See preceding note.

engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

[Sec. 10] (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed

prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

* * * * * *

Sec. 104. The amendment made by this title shall take effect sixty days after the date of enactment of this Act. * * *